Supreme Court, U.
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MICHAEL RODAK, JR.,

80-344

No.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

QUINAULT PACIFIC CORPORATION,
INTERNATIONAL PAPER COMPANY,
WHITE LUMBER SALES, INC., and
GOLD REY FOREST PRODUCTS, INC., Petitioners,

versus

AETNA BUSINESS CREDIT, INC.
and JOHN C. PENNINGTON, TRUSTEE, Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION

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QUESTIONS EVOKING THE SUPERVISORY POWER

1. *Whether* a reasonable federal judge *would have a doubt* about the parameters of judicial behavior under Art. III, Fifth Amendment Due Process, Code of Judicial Conduct for United States Judges, and 28 U.S.C.A. Sec. 455, *after reading the five published decisions of the court of appeals in which* a first panel held that "[t]he occurrence of *ex parte* conferences . . . alone do not demonstrate collusion," 581 F.2d 520, 521, but then vacated the decision "[b]ecause of the allegations of judicial misconduct contained in the petition for rehearing . . . ;" *and in which* a second panel enumerated allegations of *ex parte* discussions between a judge and adversary parties regarding orders and opinions the latter had been secretly delegated to prepare, 607 F.2d 117 (second paragraph, second sentence), but then vacated the decision without explanation, 613 F.2d 117, upon a second FRAP 40(a) rehearing petition that "state[d] with particularity the point of law or fact . . . the court ha[d] overlooked or misapprehended . . . ;" *and in which* a third panel "reinstate[d]" the vacated opinion and then held the appeal not to be "frivolous," 616 F.2d 893; *and whether this doubt would have the following consequences:*

> (a) *Pose* an unreasonable risk of debasement of federal judicial behavior notwithstanding a growing public demand for accountability and integrity of lower Federal judges;
> (b) *Embrace* a lower standard of judicial behavior than that prevailing in the *STATE OF FLORIDA* which publicly reprimanded two Supreme Court justices under Canon 3A(4) of the Florida Code of Judicial Conduct for similar conduct but without *ex parte* work sessions *(In re Dekle,* 308 So.2d 5 (Fla. 1975); *In re Boyd,* 308 So.2d 13 (Fla. 1975));
> (c) *Threaten* an unreasonable risk of conflict with popular Florida state officials and citizens fomenting fractious strains upon the fabric of Federalism;

(d) *And* inasmuch as (i) Canon 3A(4) of the Code of Judicial Conduct of the *STATE OF GEORGIA* is no different from Florida's and (ii) the Georgia Code of Judicial Conduct applied specifically to federal referees in bankruptcy, *frustrate* an important Georgia state interest in requiring members of the State Bar of Georgia (of which this bankruptcy judge is one, of which this Court can take judicial notice from files at Administrative Office of United States Courts) to live by a higher standard of behavior, where the five decisions do not identify a federal interest which would dictate a lower federal judicial standard;

And therefore whether this case calls for an exercise of the Court's power of supervision.

2. *Whether* four months of *ex parte* work sessions conducted by a bankruptcy judge with one side to a vigorously contested, pending matter (decision unannounced) which produced a 40-page opinion and numerous orders in their favor that were researched, drafted, edited and typed in law offices for adversary parties, which contacts were without notice to or knowledge of opposing side, *and whether* breakfast between the judge and trustee prior to the second session of a hearing upon the same matter, *constitute* a departure from the accepted and usual course of judicial proceedings.

3. *Whether* silent condonation by an Art. III district judge owing a duty of supervision over an Art. I bankruptcy judge and aware of supported charges of ethical violations; affirmance of 40-page respondent-prepared bankruptcy order opinion based on "clearly erroneous" standard; and a statement on the record that "I don't care to know anything about . . . bankruptcy. . . . ;" *constitute* a departure from the accepted and usual course of judicial proceedings.

4. *Whether* a proper exercise of the supervisory power *disqualifies* the bankruptcy and district judges and *vitiates* all orders and decisions of the district judge and court of appeals which accord "clearly erroneous" treatment to findings of fact signed by the bankruptcy judge.

UNSETTLED FEDERAL QUESTIONS

5. *Whether* principles of Comity, Federalism and Fifth Amendment Due Process *require* Art. I and Art. III federal judges to adhere – not to lenient federal judicial ethics, but – to exacting standards of ethical conduct binding upon judges of State courts, in those geographical areas where the actions of federal judges impact upon those several States.

6. *Whether* a litigant *has standing* to raise at trial or on appeal a violation by Art. III and Art. I judges of the Code of Judicial Conduct for United States Judges, adopted by the Judicial Conference of the United States, April 1973.

QUESTIONS PRESENTING CONFLICT BETWEEN FIFTH CIRCUIT AND OTHER CIRCUITS

7. *Whether* it is relevant for purposes of 28 U.S.C.A. Sec. 455, Fifth Amendment Due Process, Code of Judicial Conduct for United States Judges that facts of disqualification *constitute* "extra-judicial" acts.

8. *Whether* a trial judge's automatic adoption of a prevailing party's findings of fact *is acceptable.*

9. *Whether* "fraud . . ., misrepresentation, or other misconduct of an adverse party" (Fed.R.Civ.P. 60(b)(3)) *must be "prejudic[ial],"* 607 F.2d 117, 118, before a trial judge will relieve an opposing party from a final order of a bankruptcy judge approving a settlement between a trustee and a creditor.

10. *Whether* the standard of appellate review upon a trial judge's findings of fact adopted via *ex parte* work sessions *should be* the "clearly erroneous" standard under Fed.R.Civ.P. 52.

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CORRECTIONS

September 18, 1980

p. 2 Before first line, add: "("Paneling") in July, 1973. Aetna acquired a security inter-"

p. 9 Second full paragraph, line 1: "September 8, 1977" should read "September 1, 1977"

Also in second full paragraph, line 5, a period should appear after "day." After "day" a line is omitted: "Seven days later, September 8, the judge signed an order"

p. 10 At end of Footnote 16A, add: "Aetna's brief was filed in *Hampton Lumber Sales Co. v. Aetna Business Credit, Inc.*, No. C 74-1679A (August 22, 1974), on January 19, 1978."

p. 11 Footnote 18A should read: "See App. 249-251, 253.

Footnote 19A, add after "EC 8-6" and before "of *Rules and Regulations*": "(d) Standard 60, D.R. 4-101, Standard 28."

Footnote 20 omits the first page reference: "25."

p. 18 First full paragraph, line 1: "This rule" should read "B.R. 505."

p. 20 After first quotation, add: "[Emphasis added.]"

III. REFERENCES TO FIVE REPORTED OPINIONS AND ORDERS IN COURTS BELOW

Fifth Circuit Case No. 79-1076, sometimes referred to herein as "the Fed. R. Civ. P. 60(b) case", is reported at *In re Georgia Paneling Supply, Inc.*, 616 F.2d 893 (5th Cir. 1980), *reinstating*[sic] 607 F.2d 117 (5th Cir.), *vacated* 613 F.2d 137 (1979). Said case resulted from a FRAP 6(a) petition for appeal which was allowed at 588 F.2d 93 (5th Cir. 1978), *vacating* 581 F.2d 520 (5th Cir. 1978).

IV. GROUNDS ON WHICH JURISDICTION OF SUPREME COURT IS INVOKED

A. The *apparent* date of the judgment sought to be reviewed in the 60(b) case is May 8, 1980. However, a letter dated July 22, 1980 indicates that entry of original judgment was made *erroneously* upon *vacated* November 19, 1979 judgment. The error was corrected July 22, 1980 by issuance of May 8, 1980 judgment. See App. 76-79.

B. The date of the order denying petitioners' petition for rehearing and petition for rehearing *en banc* in the 60(b) case is June 3, 1980.

C. The statutory provision believed to confer on the Supreme Court jurisdiction to review the judgment by writ of certiorari is 28 U.S.C. Section 1254 (1) (1970).

V. CONSTITUTIONAL PROVISIONS, STATUTES, REGULATIONS INVOLVED IN THE CASES

Sources are referenced in the preceding Table of Contents at pages x-xii which is a lengthy table of contents to "Part Three: Constitutional Provisions, Statutes, Regulations Involved", located in Petitioners' Joint Appendix, App. 169, to which petitioners respectfully call attention.

VI. STATEMENT OF THE CASE

A. Pre-Bankruptcy Facts

Aetna made a loan[1] to Georgia Paneling Company, Inc.

[1]Contrary to Aetna's assertions below, the law of North Carolina — which is made applicable to the Aetna-prepared documents — holds that such accounts receivable financing constitutes a "loan". *North Carolina National Bank v. Lumbermens Mutual Casualty Co.*, 335 F.2d 486 (4th Cir. 1964).

("Paneling") in July, 1973. Aetna acquired a security interest in Paneling's inventory, accounts receivable, proceeds, and perfected it. *For the life of the loan,* Aetna kept track of advances, payments and credits on a "M[onth] T[o] D[ate] Transaction Summary" in the name of "GA PANELING CO". *From inception to date of bankruptcy there was always an unpaid balance.* Further loan documents were signed in October, 1973 to reflect an increase in the loan amount and on January 7, 1974 purportedly to reflect a decrease in the interest rate.

Aetna's pre-loan investigative audit examined assets owned by a sister corporation, the bankrupt, which had signed a lease-purchase agreement for a warehouse along a railroad spur. Aetna required the bankrupt to sign a separate set of Aetna-prepared loan documents each time Paneling did so, but Aetna, as drafter, took the position initially and consistently that there was "just one loan."[2] With the opening of the warehouse in August, 1973, the bankrupt could order boxcars of goods from suppliers, such as the corporate petitioners, at a lower price. In 1974 Aetna wired advances in respect of the Paneling loan directly to the bankrupt's bank account from which suppliers were paid.[3]

Contractual arrangements were made with Roberts to sell goods under the corporate name, Georgia Paneling Company of Forest Park, Inc. ("Forest Park"), at an ongoing building materials store in an Atlanta suburb which generated substantial cash flow. Roberts owned the equipment (not Paneling, as petitioners were told by the bankrupt). The bankrupt transferred inventory to Paneling which consigned it to Forest Park. Upon sale a memoran-

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[2] Under Georgia law, should a contract be deemed ambiguous, it is construed most strongly against the drafter. Ga Code Ann. Sec. 20-704 (5). *Cf. C.A. May Marine Supply Co. v. Brunswick Corp.*, 557 F.2d 1163 (5th Cir. 1977). Aetna has never shown what North Carolina law provides; consequently, if an ambiguous contract, Georgia law would be applied. *Id.*

[3] Aetna's opinion for the court distorts the facts in stating there was "no evidence" that a loan was made to Paneling. Aetna in writing its own appellate brief to the Fifth Circuit conceded there was "conflicting evidence" (pp.14-15) and the Fifth Circuit had earlier so found. 581 F.2d 520, 521. Aetna's bankruptcy opinion mentioned that Paneling signed loan documents in June, 1973 and that the bankrupt signed loan documents in June 1973, October 1973 and January 7, 1974. The inference is that Paneling signed the first loan documents, only. This inference is refuted by the fact that Paneling too signed loan documents

Footnotes continued on next page

dum was created and remitted to Paneling. On credit sales Paneling prepared an invoice that was transmitted to

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in October, 1973 and January 1974. Aetna's Duke produced the October Paneling note. Ignored also was the fact that Forest Park signed loan documents in January, 1974, for the first time.

Against this backdrop is Aetna's June 25, 1973 letter to Paneling:

[Letterhead of Aetna Business Credit, Inc., Highpoint, North Carolina]

June 25, 1973

Mr. Edward C. May, Setretary and Treasurer
Georgia Paneling Co., Inc.
122 Oak Street
Roswell, Georgia

Dear Ed:

Enclosed please find legal documents necessary to begin a financing arrangement with Aetna Business Credit, Inc. I have two sets of documents, one each for Georgia Paneling Co., Inc. and Georgia Paneling Supply Co., Inc. In addition, you will find cross-corporate guarantys[sic] and personal guaranty form for the principal shareholders covering the debt of either corporation. As a practical matter, either set of documents might be mutually exclusive, i.e., loan limit is $250,000.00. Due to the transfer of goods between corporations, we have no choice in the structuring of these documents, but we would prefer to use one corporation and one bank account for distribution of proceeds, if this is convenient for you.

Mr. Tom Duke will be by your office to assist you in the execution of the documents (especially the cross-corporate guarantys. They may appear to be a bit confusing).

* * *

Very truly yours,
AETNA BUSINESS CREDIT, INC.

Charles R. White,
Vice President

At the May 3, 4, 1977 deposition of Charles R. White he explained the letter by stating there was "just one loan." That statement raised the question as to which corporation the loan was made. His affidavit in a related plenary action a month later, the MTD transaction summaries furnished thereafter, indicate plainly that the loan was to Paneling. There could not have been one loan with joint obligors because Aetna chose to use two separate sets of its own prepared loan documents.The tenor of printed documents is construed against the author. *C. A. May Marine Supply Co. v. Brunswick Corp., supra n. 2.*

The fact that 1974 advances were made into the bankrupt's bank account is not indicative of what happened in 1973. C&S never would furnish those documents, despite repeated requests. Nevertheless, "just

Footnotes continued on next page

Aetna. Customers' checks in payment of credit invoices were physically transmitted to Aetna. On cash sales a memorandum was remitted to Paneling and the cash was transferred to the bankrupt. At the end of each month, Paneling, the bankrupt, Forest Park, and Roberts settled accounts according to various agreements.

The Forest Park store burned down December 31, 1973 (not January 19, 1974 as sworn by the bankrupt in the Statement of Affairs). On January 7, 1974, Aetna required Forest Park, for the first time, to sign a complete set of loan documents, purporting to grant a security interest in the destroyed equipment. T. R. Locke, president of the companies, signed the 20 or more loan documents without reading them, satisfied with a decrease in the interest rate.[4]

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one loan" was made to Paneling; and the MTD transaction summaries conclusively establish that the loan was never paid off. It began as Paneling's loan and ended unpaid as Paneling's loan.

Aetna could foreclose against the bankrupt only as a guarantor of Paneling but the guaranty was not secured. Therefore, corporate action by the bankrupt would seem required, although no further corporate action would have been necessary had the loan been made to the bankrupt.

Another distortion was that all inventory and accounts receivable were owned by the bankrupt. In fact, discovery documents in *Pennington v. Aetna* show that Paneling owned both. See Balance Sheets for Paneling at March 31, 1973, March 15, 1974. The bankruptcy judge's abrupt termination of the 60(b) hearing and failure to follow through with the tentatively-scheduled November 9, 1977 hearing prevented petitioners from establishing this testimony.

[4] Aetna also wrote for the bankruptcy judge that the fire took place December 31, 1973; and that petitioners knew it, discussed it among themselves at the time, and were aware that fire insurance proceeds were owned and transmitted to Aetna by the bankrupt. Therefore, the evidence was not new nor did petitioners act with due diligence.

The truth is that the petitioners believed the bankrupt's verified Statement of Affairs which stated that the fire occurred January 19, 1974, which was *after* the January 7, 1974 loan documents were executed. The depositon of Quinault Pacific Corporation's A. R. Johnson in *Pennington v. Aetna* establishes that he had no contact with the bankrupt from December 26, 1973 to late January, 1974. Therefore, Quinault could not have known about the fire until late January and that was after the fire date ultimately given in the Statement of Affairs six months later. Furthermore, Johnson's testimony is that the discussions concerned the bankrupt's nonpayment of his invoice. *He did not recall the year of any other discussions which were incidental.*

The truth is that while petitioners knew the fire insurance proceeds had been paid to Aetna, petitioners were not aware that (a) the equipment was owned by Roberts, (b) Forest Park provided considerable cash flow to the bankrupt, (c) the January 7, 1974 loan documents

Footnotes continued on next page

Earlier in December, 1973, after a comprehensive audit, Aetna had become very dissatisfied with the Paneling loan and decided to liquidate it. Aetna was aware of the fire and the bankrupt's receipt of a $60,560 check because the bankrupt and Roberts, beneficially, were insured by Aetna's parent company, a major casualty insurer. $26,000 of the check represented Roberts' equipment, and Aetna knew it. Aetna claimed $34,560 of the check as proceeds of inventory and threatened criminal prosecution if payment for or on account of inventory was cashed or deposited by the bankrupt. When the bankrupt delayed remitting the check, Aetna wrote on February 13, 1974 stating that a recent audit showed a "negative" net worth for the combined sister corporations, Paneling's total debt was $229,000, and Aetna wanted to liquidate the loan.

Paneling and the Bankrupt were desperate for cash ($171,000 in December advances had been reduced to $71,000 in January); and upon Aetna's verbal promise (a) to return $26,000 so that Forest Park could be reopened and (b) to resume a normal lender-borrower relationship, the bankrupt remitted the $60,560 check and Paneling $60,339 of customers' checks. The record contains Roberts' affidavit to use the proceeds to reopen Forest Park and Locke's to give the $26,000 to Roberts if it should come to the bankrupt.

Aetna reneged and ultimately paid off Roberts' debt to the First National Bank. *As a consequence, the bankrupt was unable to procure the reopening of Forest Park or to pay its debts in the ordinary course of business and rendered irretrievably insolvent.* Commencing February 24, 1974, the beginning of the four-month voidable preference period[5], Aetna collected ultimately $5,000 to $10,000 more

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were without consideration and fraudulent. They were unaware of these facts because all that was important under their misapprehended date of fire (Jan. 19, 1974), was that the bankrupt was (seemingly) *benefited* at the expense of Forest Park. When the real fire date (Dec. 31, 1973) was learned, a question of the validity of the January 7, 1974 loan documents, including the so-called "cross-collateralization agreement" naturally surfaced; and inquiry into the whole transaction disclosed the interest of Roberts and the *harm* done to the bankrupt rather than benefit.

[5] Bankruptcy Act of 1898, Sec. 60b. Other sections involved are Sections 67 and 70.

than the $229,000 owed on February 13. Aetna did so by pumping just enough money into the bankrupt that its major suppliers, the corporate petitioners, would keep selling it goods which Paneling in turn sold to the public whose checks in payment were transmitted to Aetna and collected.

B. **Newly Discovered Substantive Facts.**

Fearing dismemberment of the bankrupt upon Aetna's notorious foreclosure of June 3, 1974, petitioners caused an involuntary petition in bankruptcy to be filed June 24, 1974 and a *receiver* to be appointed July 29, 1974 to preserve the books and records. The receiver represented that he could not locate any books and records. At the first meeting of creditors, September 10, 1974, the receiver was appointed trustee. The *trustee* claimed all along he had no important books or records. Petitioners examined what was represented as his books and records at offices of trustee's co-counsel.

Aetna represented at a settlement hearing, May 18, 1976, that the facts were "simple" and, among them, Aetna had made a loan to the *bankrupt*. In a December, 1976 response to discovery in a related plenary action, *Aetna represented that its books and records pertaining to the bankrupt's sister corporations were irrelevant to a charge that Aetna's bad faith should estop it too to deny it was an unsecured creditor subordinated to petitioners' claims against the bankrupt*. After Aetna's discovery of petitioners had been handled by agreement of counsel, Aetna refused to produce any documents in said plenary action. Petitioners filed a motion to compel discovery in April 1977. At a chambers conference with the district judge who refused to order sanctions, Aetna promised to produce documents to petitioners but did not comply even in part until April 27, 1977. Aetna delivered the rest in dribs over a period of 30 days, or by late May 1977. From this information petitioners were at last able to discern the true facts of substantive fraud. Their 60(b) motion was filed May 31, 1977. At a deposition in mid-June 1977 of a former Aetna vice president, petitioners obtained the last critical, material evidence unproduced and hence concealed by Aetna: Paneling's October, 1973 Aetna-prepared promissory note.

Petitioners learned that the trustee had in fact obtained copies of invoices covering the last six months of business operations. Analysis showed that 80 percent in dollar value were on Paneling's letterhead and 20 percent on the bankrupt's. Petitioners learned that Aetna's MTD transaction summaries were carried in the name of "GA PANELING CO" and the receiver-trustee had been receiving them from Aetna since bankruptcy. Petitioners learned that the bankrupt had committed perjury by representing in the Statement of Affairs that the Forest Park fire had occurred January 19, 1974 (rather than December 31, 1973 as Aetna's unjustifiably-withheld audits disclosed). Locke, *who had verified the statement, had personally guaranteed all of Paneling's indebtedness to Aetna.* Only then did petitioners have cause to examine the consideration for the January 7, 1974 Forest Park loan documents (none) and then the identity of the owner of the previously destroyed equipment. Locke had sworn that all equipment was owned by Paneling; inquiry in May 1977 disclosed Roberts to be the owner of Forest Park's. Only then did petitioners conceptualize that Aetna's conduct had harmed the bankrupt (deprived it of cash flow from Forest Park) rather than benefited it (paid bankrupt's loan at expense of Forest Park).

Furthermore, petitioners discerned that cross-collateralization agreement allegedly signed January 7, 1974 was not executed until after March 8, 1974, an Aetna audit noting the lack thereof. Petitioners then had reason to inquire into the bankrupt's guaranty of Paneling's loan to learn it was unsecured.

These facts constitute the basis for an estoppel in favor of the trustee for Aetna's bad faith conduct toward the bankrupt preventing Aetna from setting up its perfected security interest against the trustee, even if the loan were to the bankrupt and not Paneling. *Cf. Central Soya Co., Inc. v. Bundrick*, 137 Ga. App. 63, 222 S.E. 2d 852 (1975); *Pennington, Trustee v. Aetna Business Credit, Inc.*, No. 75-1540A (N.D. Ga. March 30, 1978) (Order denying Aetna's Motion for Summary Judgment); *In re Samuels & Co., Inc.*, 526 F.2d 1238 (5th Cir. 1976) (*en banc*), *cert. denied* 429 U.S. 834.

C. **Post-Bankruptcy Facts.**

At the time newly discovered substantive evidence was obtained and petitioners were re-analyzing the Aetna-Paneling-bankrupt-Forest Park-Roberts relationship, petitioners' appeal from the bankruptcy judge's June 17, 1976 order approving a $350 settlement between Aetna and the trustee *over petitioners' protests for Aetna's harassment of the bankrupt* had just been affirmed on April 15, 1977 by the district judge. Petitioners had urged on appeal that the bankruptcy judge should have deferred to the district judge before whom the plenary action was pending (*cf. Chicago & Southern Airlines, Inc. v. Waterman Steamship Co.*, 333 U.S. 103 (1948)), or that an evidentiary hearing should have been held in bankruptcy court prior to approval (*Protective Committee v. Anderson*, 390 U.S. 414 (1968)). Petitioners were in a dilemma about how to set aside the settlement by reason of the newly-discovered evidence. They decided to move the district judge on May 16, 1977 to allow them an extension of time to file an appeal to the court of appeals. At the same time petitioners were aware that the maximum one year period under Fed. R. Civ. P. 60(b) (2), (3) for setting aside a judgment for newly discovered evidence or adversary party misconduct would expire June 17, 1977. Under this pressure they moved the district judge on May 31, 1977 to vacate his April 15th affirmance under Rule 60(b).

The district judge denied the motion to extend time to appeal, set a hearing date on the 60(b) motion (July 19, 1977), and held that petitioners' right of appeal would be preserved by his ruling on the 60(b) motion. Order of June 15, 1977. At the 60(b) hearing, the district judge determined to address in the first instance several procedural issues in the case. On July 22, 1977 he denied the 60(b) (2), (3), (6) motion because he perceived (erroneously) that more than one year had expired as to grounds (2), (3) and no extraordinary circumstances had been shown for ground (6). Petitioners filed a second Fed.R.Civ.P. 60 motion to rectify the district judge's misapprehension of fact, resulting in his order of August 26, 1977 remanding the 60(b) (2), (3) motion to the bankruptcy judge for an evidentiary hearing.

D. **Facts of Judicial Disqualification**[6]

(It should be borne in mind that petitioners were unaware of the italicized facts of judicial disqualification until February 28, 1978, with the exception of one petitioner viewing the breakfast meeting referenced below.)

On September 8, 1977 Aetna's attorney, C. Edward Dobbs, submitted an application *to the bankruptcy judge ex parte* calling for a hearing on an assessment of attorneys' fees against petitioners for bad faith appeal and 60(b) motion. The bankruptcy judge signed an order that day calling for a joint hearing on petitioners' remanded 60(b) motion and Aetna's fee motion for September 19, 1977 at 8:00 A.M. The bankruptcy judge *received Aetna's attorney* because he was one of the referee's few hand-picked no-asset trustees who had handled over 200 no-asset cases for the referee which the referee would have had to handle alone without a trustee.

Informed of Aetna's fee motion, the trustee's co-counsel, Freeman & Hawkins (by D. L. Cronkright, partner) submitted the next day, Friday, September 9, a similar application *ex parte to the bankruptcy judge who signed a Cronkright-prepared order* Monday, September 12, giving notice of a hearing on the same date and time as the two previous motions. The referee *received* the trustee, co-counsel because the trustee was another of the referee's no-asset trustees who had served as such in a large number of cases.

Prior to the September 19, concurrent hearing on petitioners' remanded 60(b) motion and respondents' motions for fee award (no amount specified), *the bankruptcy judge initiated contact with Cronkright;*[7] *and with the trustee they researched*[8]*, drafted and typed two other pre-hearing orders* denying petitioners' motions,[9] *excluded petitioners' counsel,*[10] one motion of which sought a continuance because of

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[6] See generally App. 242-253.

[7] "'The judge asked me to take an order.': Depo. D. L. Cronkright, March 3, 1978, 85.

[8] R.(79-1076) Vol. II 204-207.

[9] "Mr. Cronkright and I prepared that order, or prepared a draft. We brought it to the Judge." 2d. Supp. R. (78-3370) Vol. II 57.

[10] "Q [By petitioners' counsel] Well, did you call me or my office prior to going to see Judge Norton with Cronkright? A [By the trustee] Well, I'm sure we didn't because you weren't there." Depo. J. C. Pennington, March 3, 1978, 24.

an unrelated jury trial on September 19, which petitioners' counsel was scheduled to try.[11]

Prior to the second day (September 20, 1977) of the concurrent hearing, the bankruptcy judge had breakfast with the trustee.[12] An employee of petitioner International Paper Company personally observed them having breakfast.

The presentation of petitioners' case under rule 60(b) was frustrated by constant interruptions by respondents which were condoned by the bankruptcy judge.[13]

Reserving decision on the 60(b) motion and calling for briefs of evidence whether there was any material fact in dispute,[14] *the bankruptcy judge secretly contacted Aetna's lawyer with respect to an order opinion denying the 60(b) motion.*[15]

The 40-page opinion *was drafted by Aetna's lawyer.*[16A] The 40-page opinion *was typed in the offices of Aetna's law firm.*[16] The 40-page opinion *was discussed ex parte by the*

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[11] Indeed, District (now Circuit) Judge Albert J. Henderson, Jr.'s law clerk interrupted the hearing regarding counsel's availability for trial. Supp. R. (79-1076) Vol. IV. 92.

[12] *Cf.* ". . . I have had breakfast with him before, and it could have been that day . . ." (Depo. J. C. Pennington, March 3, 1978, 27) *with* "I don't have breakfast in Atlanta, Georgia, with anybody . . ." (Bankruptcy Judge, 2d. Supp. R. (78-3370) Vol. II 65.)

[13] Supp. R.(79-1076) Vol. IV. 60, 61, 89, 96, 32, 106.
Supp. R.(79-1076) Vol. V. 227, 228, 245.

[14] Supp. R. (79-1076) Vol. V. 302.

[15] Bankruptcy Judge did not deny this charge made to him by petitioners' counsel in open court. 2d. Supp. R. (78-3370) Vol. II. 25.

[16] "Mr. Dobbs' office typed an opinion for this Court." 2d. Supp. R. (78-3370) Vol. II. 25.

[16A] *Compare* use of the following adverbs in the January 5, 1978, opinion: "First" (App. 46), "Secondly" (App. 46), "Thirdly" (App. 47), "Fourthly" (App. 47), "Fifthly (App. 49), "Sixthly" (App. 50), "Seventhly" (App. 50); "Finally" (App. 51, 56, 59, 42, 44); *with* use of the following adverbs opening paragraphs in Aetna's January 19, 1978 Brief in Support of Motion for Reconsideration: "First" (App. 235), "Secondly" (Id.), "Thirdly" (Id.), "Fourthly" (Id.), "Fifthly" (Id.), "Sixthly" (App. 236), "Seventhly" (Id.), "Eighthly" (Id.), "Ninthly" (Id.), "Tenthly" (Id.), "Eleventhly" (Id.), "Next" (Id.), "Finally" (App. 238). Aetna's Brief was designated to the district judge for inclusion in the record on appeal to Fifth Cir. but the district judge disallowed it; upon petitioners' Motion to Supplement the Record on Appeal, Fifth Cir. denied same April 4, 1979.

bankruptcy judge and Aetna's lawyer.[17] The 40-page opinion was *edited and revised by trustee's co-counsel.*[18]

Aetna and the trustee never produced any competent evidence to substantiate their contentions, only unauthenticated exhibits.

The 40-page opinion set a date for the continued hearing upon respondents' motion for fee awards.

The foregoing acts were accomplished prior to the filing of the December 20, 1977 order of the bankruptcy judge, although the 40-page opinion was not filed until January 5, 1978.[18A]

At the end of the first day (February 14, 1978) of continued fee hearing, the bankruptcy judge ruled orally that he "certainly" would not hold petitioners' counsel liable for respondents' attorneys' fees, although he would hold petitioners liable for some part.[19] At that time, no specific amount had been sought in any document of record.

At the second day (March 6, 1978) of the continued hearing, having received (February 28, 1978) respondents' time records, by clerical error, seeking almost $40,000.00 of attorneys' fees but clearly proving numerous instances of misbehavior by the bankruptcy judge, the trustee, trustee's co-counsel and Aetna's lawyer, petitioners' counsel had a legal and ethical duty to,[19A] and did confront the bankruptcy judge, who was enraged, prompting him to admit "we even discussed it [the draft 40-page opinion, *ex parte*]."[20]

The bankruptcy judge's June 7, 1978, order holds petitioners' counsel jointly and severally liable with petitioners for $36,331.50 of attorneys' fees to the trustee, acting as his own attorney,[20A] to trustee's co-counsel and to

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[17] "[w]e even discussed it . . ." See note 16.

[18] "Review and editing of proposed Order for Judge Norton's signature provided by Ed Dobbs." R. (78-3370) Vol. I 177 et seq., 212 et seq.; R.(79-1076) Vol. I 84-112, 39-45, 46-80; Depo. D. L. Cronkright, 92-93.

[18A] See App. at 207-212.

[19] 2d. Supp. R. Vol. I. 103.

[19A] Counsel's duties are set forth in (a) EC 1-4, DR 1-103, DR 1-102 (A); and in (b) EC 7-35, DR 7-102 (5), (8); and in (c) Canon 8, EC 8-5, EC 8-6; of *Rules and Regulations for Organization and Government of State Bar of Georgia*, 241 Ga.643 et seq. App. at 207-212.

[20] 2d. Supp. R. Vol. II 36, 65.

[20A] *Contra, In re First Colonial Corp of America*, 544 F.2d 1291 at 1299 (5th Cir. 1977).

Aetna, *including the time referenced above.*

Previously announcing on the record that "I don't care to know anything about . . . bankruptcy. . . . ",[21] the *district judge entertained an ex parte application by the bankruptcy judge (and possibly respondents) to open depositions in a pending plenary action, Pennington v. Aetna Business Credit, Inc., et al.,* No.C75-1540A (N.D.GA., filed August, 1975), *in order to furnish alleged support for the bankruptcy judge's award of attorneys' fees against petitioners,*[22] *after which* district judge affirmed the award, tossing off petitioners' charges of partiality as "not exemplary, but neither was it clearly erroneous,"[23] after having had full details brought to his attention months before.[23A]

At oral argument on April 14, 1980 upon the fee appeal (Case No. 78-3370), before a *third* panel of the United States Court of Appeals for the Fifth Circuit to grapple with the 60(b) case, the second to hear the fee award case, respondents' counsel made admissions *in judico* that (a) Aetna had drafted the order opinion for the bankruptcy judge and (b) the judge and trustee had breakfasted together the day in issue. Considering petitioners' evidence, this left no doubt but that the bankruptcy judge had perpetrated misrepresentations of material fact and Aetna had made misleading statements in its briefs to the first and second panels of the Fifth Circuit. They also lend themselves to the reasonable inference that the fee award order of June 7, 1978 and supporting memoranda of September 11, 1978 and November 14, 1978 were likewise prepared by respondents. Ide referred to preparation of the 40-page opinion by his firm as a matter of "common practice in that bankruptcy court." As shown at another place, this assertion is untrue. *Infra* at 20. This would suggest too that Aetna's liasion with the bankruptcy judge was knowingly and wilfully calculated to assist Aetna to recover $600,000.00 in general, special and punitive damages against the corporate petitioners sought in its October 25, 1977 counterclaim filed in the plenary action. App. 222.

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[21] Supp. R.(79-1076) Vol. III. 34.

[22] Order, July 25, 1978, in *Pennington v. Aetna*, App. at 142.

[23] Order, August 30, 1978, at App. at 86.

[23A] R. (79-1076) Vol. I. 39-45, 46-80, 84-112; R.(78-3370) Vol. I at 177 and at 212.

E. Manner in Which Facts of Judicial Disqualification Were Learned and Petitioners' Resulting Dilemma

The fee hearing *and* the remanded 60(b) hearing came on for hearing concurrently on September 19, 1977 before the bankruptcy judge. His schedule allowed two (2) hours for both matters.[23B] The litigation, even at that point, was complex. He was fully aware that petitioners believed their claims well founded in fact and at law. Objective evidence of close personal and professional relationships among the bankruptcy judge, the trustee and Aetna's counsel were of gnawing concern to petitioners. Accordingly, on September 19, 1977, they filed "Motion to Reassign Case" to another bankruptcy judge. Observing the bankruptcy judge and trustee at breakfast the following day did not dissipate their concern[24].

Respondents interpreted the motion as a motion to disqualify the bankruptcy judge[25]. Except for counsel's desire not to enrage the bankruptcy judge, his upbringing to handle sensitive issues euphemistically and his knowledge of *Mitchell v. Sirica*, 502 F.2d 375, (D.C. Cir.), *cert. denied* 94 S. Ct. 3232 (1974), he might have so styled it. But if he had, it would have been denied and affirmed on appeal on the evidence available to him at that time. *Id.* Ironically, the bankruptcy judge denied the motion to reassign on Sept. 23, 1977, while at the same time (as the facts learned Feb. 28, 1978, support) secretly engaging in continuous *ex parte* contacts with respondents.

In February 1978 upon acquiring knowledge of judicial disqualification, the 60(b) case was on appeal to the district court. Petitioners could not raise his disqualification in bankruptcy court and have any effect on the 60(b) determination. They had to raise the issue on appeal in the district court. They did so. This approach is approved in

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[23B] Ultimately, some 8 hours were used on the 60(b) motion and 23 hours were expended on the fee award rather than the 2 hours initially allotted. Petitioners believe this warranted their Motion to Reassign, although part of the fee award was based on filing the motion.

[24] Petitioners' research disclosed such conduct alone was not sufficient to disqualify, *Mitchell v. Sirica*, 502 F.2d 375 (D.C. Cir.1974), *cert. denied*, 94 S.Ct. 3232 (1974).

[25] 2d. Supp. R. (78-3370) Vol. I at 35; Supp. R.(79-1076) Vol. VI at 35. (Transcript February 14, 1978.)

Davis v. Board of School Commissioners, 517 F.2d 1044, 1051 (5th Cir. 1975).

The evidence of disqualification was learned February 28, 1978 during a recess in the continued hearing on the fee application. The next date scheduled was March 6, 1978. On February 28, petitioners were advised that total fees sought could be close to $40,000. Petitioners were in great peril: they believed the bankruptcy judge was not a man of integrity and would deny any motion for recusal with or without a 28 U.S.C. Sec. 144 affidavit (which would simply divert attention to the lawyer and a document). He could enter a huge award of attorneys fees against petitioners (but had said he would not against petitioners' counsel February 14, 1978). T 103. Prevailing law indicated that while disqualification could be raised by mandamus, it would be denied where appeal lay. Finally, 28 U.S.C.A. Sec. 455 is self-enforcing on its face and the Fifth Circuit had ruled it self-enforcing on the part of the judge. *Davis v. Board of School Commissioners*, 517 F2d 1044, 1051 (5th Cir. 1975). If a party could establish that a judge's conduct raised a question of partiality, the judge would be obliged to disqualify himself *sua sponte*. Although the bankruptcy judge undoubtably would not do so, his failure would be reviewable on appeal and the diversion of an affidavit would be averted[26].

For the foregoing reasons, petitioners confronted the bankruptcy judge with as much tact as humanly possible on March 6, 1978 with the charge that he had violated Canon 3A (4) of the Code of Judicial Conduct for United States Judges, T 20, hoping against hope that he would not hurl a huge fee award against them. The bankruptcy judge was enraged. T36, 65. He stated that he was on trial; that an accusation had been made against him. T19, 22. He did not disqualify. He never mentioned disqualification in any document of record. By contrast, the District Judge recognized that the issue of the bankruptcy judge's disqualification was before him in his orders of August 30, 1978, and October 13, 1978, affirming the fee award. The Fifth Circuit recognized that the issue of judicial disqualification

[26] In the 69 years that 28 U.S.C. Sec.144 has been on the books, only a few affidavits have been found legally sufficient, according to petitioners' research.

under 28 U.S.C.A. Sec. 455 was before it. Initially in the 60(b) case the Fifth Circuit held the misbehavior to be extrajudicial. 581 F2d at 521. Subsequently, the (first) panel vacated the opinion "[b]ecause of allegations of judicial misconduct." 588 F2d 93. Petitioners interpret this as a change of position on the issue of extrajudiciality.

F. Aetna's $70,000 Settlement with Hampton

After the first vacation, 588 F.2d 93, and before the second panel opinion, 607 F.2d 117, Aetna paid Hampton $70,000.00 to drop all litigation against Aetna including the 60(b) motion, Hampton's plenary action against Aetna for conversion of $39,000 of goods, Hampton's intervention against Aetna, in return for which Aetna would dismiss its $600,000 counterclaim against Hampton and its $36,000 joint and several fee award against Hampton. The remaining petitioners urged the Fifth Circuit to remand for a hearing at which they would be allowed to show that Aetna did not perceive petitioners had injured Aetna. Cf. *Lloyd v. Thomas*, 195 F2d 486 (7th Cir. 1952); Fed. R. Evidence 408.

VII. SUPREME COURT SHOULD INVOKE ITS INHERENT POWER OF SUPERVISION TO PROTECT THE INTEGRITY OF THE FEDERAL COURTS AND TO DETER ILLEGALITY

A. Nature of General Supervisory Power

"[T]he supervisory power serves the 'two-fold' purpose of deterring illegality and protecting judicial integrity." *United States v. Payner*, ___ U.S. ___, 48 USLW 4829 at 4832, n8 (1980). While the supervisory power has been applied most notably in criminal cases, see, e.g., *McNabb v. United States*, 318 U.S. 332 (1943); *Nardone v. United States*, 308 U.S. 338 (1939), it has been utilized by an Art. III court to curb an Art. I bankruptcy court's excessive use of power to interfere with state court proceedings, *Calloway, Trustee v. Benton*, 336 U.S. 132 (1949), and to restrict an erroneous exercise of Art. III judicial power in civil cases. *Thermtron Products, Inc. v. Hermansdorfer*, 423 U.S. 336 (1975); *Thiel v. Southern Pacific Co., 328 U.S. 217 (1946)*. Deprivation of an impartial judge can never be

considered harmless error. *Chapman v. California*, 386 U.S. 18, 23 (1966)

B. Nature of Special Supervisory Power In and Over Court of Bankruptcy

"Court of bankruptcy" was created by Congress in the Bankruptcy Act of 1898[27] as an Art. I court[28], and was defined as an Art. III district judge[29] and, upon reference, an Art. I referee in bankruptcy[30]. The latter was appointed to a six year term by a majority of the district judges for the district[31]. The referee could be removed from office for incompetency, misconduct or neglect of duty by that same majority[32]. On petition for review by the district judge, the latter could hear evidence in assessing the correctness of the referee's findings of fact[33]. The referee had no power of contempt, but could certify facts thereof to the district court for disposition[34]. Supervisory power was complete.

Effective October 1, 1973, Bankruptcy Rules of Procedure were approved by the Supreme Court[35] under enabling legislation which permitted substantive changes in the Act of 1898[36]. It designated the referee as "bankruptcy judge" when contested proceedings were commenced by complaint[37]. The referee was given power to assess a fine up to $250 for a criminal contempt committed in his presence, but more serious conduct deserving of a larger fine had to be certified to the district court.[39] The referee could be removed as under prior law.[40] Except for the bankruptcy judge's November 14, 1978 memorandum and the district judge's February 20, 1979 order affirming the former, all judicial acts in the instant case took place after the effective date of the 1973 Bankruptcy Rules but before the Nov. 6, 1978 enactment of the Bankruptcy Code of 1978. The latter provided that on date of enactment,

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[27] Act of July 1, 1898, c. 541, 30 Stat. 544 (1898).
[28] U.S. Const. Art. I, Sec. 8, cls. 4, 18.
[29] Act of July 1, 1898, C. 541, Sec. 1(10), 30 Stat. 544 (1898).
[30] *Gilbertson v. United States*, 168 F. 672 (7th Cir. 1909).
[31] Act of July 1, 1898, c. 541, Sec. 34, 30 Stat. 655 (1898).
[32] *Id.*
[33] *Id.* Sec. 23
[34] *Id.* Sec. 41
[35] 411 U.S. 991 (1973).
[36] 28 U.S.C. Sec. 2075 (1970).
[37] B.R. 901(7).
[39] B.R. 920.
[40] Act of July 1, 1898, c. 541, Sec. 34, 30 Stat. 544 (1898).

November 6, 1978, referees were to be henceforward called bankruptcy judges regardless of their function.[41] While a bankruptcy judge could still be removed for incompetency, misconduct or neglect of duty, the judicial council for the circuit alone could remove him.[42] The 1898 Act was repealed effective October 1, 1979[43] but the Bankruptcy Rules of Procedure are to be followed until March 31, 1984 unless inconsistent with the 1978 Code.[44] The 1978 Code allows the bankruptcy judge to punish contempts committed in the judge's presence so long as the conduct does not warrant imprisonment.[45] During the transition period, the district courts will continue to review findings of fact and conclusions of law of bankruptcy judges.[46] After April 1, 1984 review will be by a panel of three bankruptcy judges with ultimate review by the court of appeals.[47] At present district courts possess some supervisory power over bankruptcy judges.

C. Nature of Ethical Precepts Binding on Court of Bankruptcy

Adopted by the American Bar Association in 1924, the Canons of Judicial Ethics came to represent the norm for all judicial behavior. *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 (1968). In 1967 the National Conference of Referees in Bankruptcy adopted a resolution affirming that referees were subject to the Canons. R. L. Hiller, "Problems of Judicial Ethics for Referees in Bankruptcy," *Proceedings of Fifth Seminar for Newly Appointed Referees in Bankruptcy* (1968) at p. 4.

A new Code of Judicial Conduct was adopted by the American Bar Association in 1972 and by the Judicial Conference of the United States in April, 1973.[48] On December 5, 1974 Canon 3(C) was enacted into law as new 28 USCA Sec. 455 (expanding the scope of a 1911 statute).[49]

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[41] Act of November 6, 1978, Pub. L. No. 95-598, Sec. 213, 92 Stat. 2549 (1978) (to be codified as 28 U.S.C. Sec. 451).
[42] *Id.* Sec. 201.
[43] *Id.* Sec. 402(a).
[44] *Id.* Sec. 404(a).
[45] *Id.* Sec. 241.
[46] *Id.* Sec. 405.
[47] *Id.* Sec. 201.
[48] Judicial Conference of the United States, *Reports of Procedure*, April 5-6, 1973, pp. 9-10.
[49] Act of December 5, 1974, Pub.L. No. 93-512, 88 Stat. 1609 (1974)

The Code of Judicial Conduct for United States Judges and 28 USCA Sec. 455 were fully binding on the Art. III judges and Art. I referee in bankruptcy at all material times in the instant case. The Bankruptcy Code of 1978 struck "referees in bankruptcy" from Sec. 455,[50] effective November 6, 1978, because on that, the effective date of the Code, the title of referee was officially changed to bankruptcy judge.[51] As such, they were "judges", albeit Art. I judges.

This rule reflected a new ethical consensus following upon the Code of Judicial Conduct. Only Rule 505 (b)(1) which incorporated and superseded Sec. 39b(1) of the 1898 Act had any predecessor under the Act.[52] The rule became effective October 1, 1973.[53]

D. **Improper Conduct in Court of Bankruptcy.**

1. *Background: Uneven Criticism of Mechanically-Adopted Findings of Fact.*

Despite Second Circuit Judge Jerome Frank's 1942 condemnation of district judge's mechanically "finding" facts filed in the clerk's office and submitted to the judge, *United States v. Forness*, 125 F.2d 928, 942-43 (2d Cir. 1942), the Supreme Court through Mr. Justice Douglas took a more lenient position two years later in *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), and 20 years later on appeal from the District Court of Utah, Willis W. Ritter, Judge, *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). Thereafter, judge Ritter was reversed several times by the Tenth Circuit for the same or similar conduct.[54]

The lack of strong condemnation by the Supreme Court led to loose practices in district courts which many circuit courts tried to halt. *Roberts v. Ross*, 344 F.2d 747 (3rd Cir. 1965). The strongest language to date is from *Ramey*

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[50] Act of November 6, 1978, P.L. No. 95-598, Sec. 213, 92 Stat. 2549 (1978).

[51] *Id* Sec. 214 (to be codified as 28 U.S.C. Sec. 455).

[52] Bankruptcy Act Comment to B.R. 505, *Collier Pamphlet Ed., Bankruptcy Act and Rules*, Part 2, 1976, p. 892.

[53] 411 U.S. 911 (1973).

[54] *Kelson v. United States*, 503 F.2d 1291 (10th Cir. 1974); *G. M. Leasing Corp. v. United States*, 514 F.2d 935 (10th Cir. 1975). *Cf. United States v. Ritter*, 540 F.2d 459 (10th Cir. 1976); *United States v. Bray*, 546 F.2d 851 (10th Cir. 1976); *Webbe v. McGhie Land Title Co.*, 549 F.2d 1358 (10th Cir. 1977).

Construction Co. v. Apache Tribe of Mescalero Reservation, 616 F.2d 464 (10th Cir. 1980) calling the procedure "*indefensible and almost universally condemned*" [Emphasis added] 616 F.2d at 469 (n7).

Beginning in 1964 the National Conference of Bankruptcy Referees sponsored seminars for newly appointed referees in bankruptcy, modeled after seminars held for newly appointed district judges. One referee wrote at length of the necessity of a referee preparing his own findings and conclusions:

> "It should be remembered that referees in bankruptcy are not supplied with law clerks. . . . . Hence, briefs and requests for findings of fact and conclusions of law should be required of counsel in complicated cases, *not for the purpose of being peremptorily adopted or rejected, but as aids in arriving at one's own.* [Cite]
>
> " . . . I have no difficulty in following *Judge Wright's admonition that the correct adjudicating process cannot take place unless I make findings of fact and conclusions of law of my own.*
>
> "[T]he qualifying standards of [referees'] *right* to be *designated judges* of the court of bankruptcy *derive* from the judicial quality of the conduct of their hearings, and *from their conscientiousness and erudition in the preparing of legal opinions and their findings of fact and conclusions of law.*"

W. Washabaugh, Jr., "Contested and Non-Contested Matters," *Proceedings of Seminars for Newly Appointed Referees in Bankruptcy* (1964) at pp. 253-54, 256. [Emphasis added.]

2. *Ghost-Written Findings of Fact for Referee.*

Under the second sentence of new Canon 3A(4) of the Code of Judicial Conduct [App 193] as well as the first sentence of the second paragraph of old Canon 17 of the Canons of Judicial Ethics [App. 207], a brief of argument presented to the bankruptcy judge by one party cannot be concealed from opposing counsel. Similarly Local Rule 91.8 of the Northern District of Georgia provides that (a) when a district judge announces his ruling in open court, (b) the prevailing party's counsel shall submit a proposed order within two days, and (c) simultaneously send service copy to opposing counsel.

A judge cannot obtain legal advice except upon notice to the parties. The proven and admitted facts in the instant case that the orders and opinions of the bankruptcy judge were the secret work product of ghost-writer Dobbs and editors Cronkright and Pennington clearly violate judicial ethics. *In re Dekle*, 308 So.2d 5 (Fla. 1975); *In re Boyd*, 308 So.2d 13 (Fla. 1975).

3. *Ex Parte Work Sessions.*

Ex parte conferences are highly disfavored under old Canon 17 (first paragraph) and are condemned under new Canon 3A(4) (first sentence). Referees in banruptcy were aware of the condemnation of *ex parte* conferences:

> "All conferences at side-bar or in chambers should be with counsel for all parties in attendance at the same time. *It is a breach of judicial etiquette, indeed of judicial ethics, especially in an adversary situation, to meet or confer with one side only.*"

R. Hiller, "Problems in Judicial Ethics for Referees in Bankruptcy," *Proceedings of Fifth Seminar for Referees in Bankruptcy* (1968) at 7.

Finally from a referee, now bankruptcy judge in and for Northern District of Georgia:

> "*Ex parte* orders are orders signed and filed without notice of hearing to adverse parties. Because of procedural due process requirements of notice, and an opportunity to be heard, it can generally be said that we cannot decide on an *ex parte* basis any matter involving substantial adverse interest or interests."

W. Homer Drake, "Contested Matters & Ex Parte Proceedings," *Proceedings of Fifth Seminar for Newly Appointed Referees in Bankruptcy* (1968) at 252. Rather than prove Aetna's assertion at a court of appeals' rehearing that the instant shenanigans were common practice in the Northern District of Georgia, *a bankruptcy judge of the very district has repudiated it in writing!* Georgia state courts also condemn *ex parte* conferences. *Grizzard v. Davis*, 131 Ga. App. 577, 206 S.E.2d 853 (1974).

Art. III courts have not condemned *ex parte* conferences as they should have. Possibly part of the reason is *Mitchell*

v. Sirica, 502 F.2d 375 (D.C. Cir.) (*en banc*), *cert. denied* 94 SCt 3232 (1974). Regarding the instant case, the first panel of the Fifth Circuit to hear the FRAP 6(a) petition for allowance of appeal observed:

> "The occurrence of *ex parte* conferences . . . alone do not demonstrate collusion." 581 F.2d 520, 521.

The panel cited *Martelli v. City of Sonoma*, 359 F. Supp. 397 (N.D. Cal. 1973), which was decided one month after the Judicial Conference of United States adopted the Code of Judicial Conduct for United States Judges, April, 1973. The subsequent vacating of 581 F.2d 520 may have meant that the panel withdrew the holding.

4. *Social Relations: Herein of Breakfast Meeting*

New Canon 5A [App 199] and new Canon 5C (Financial Activities) (4)(b) [App. 205] were developed from old Canon 33 which was quoted with approbation by the Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145 at 149-150 (1968), in disqualifying the third arbitrator for not disclosing a connection to the winning party. Referees have recognized that social relations can be improper:

> "Public social appearances with members of the bar invite attention and misunderstanding. I do not think it necessary to abandon all personal friendships when one becomes a referee, but it is imperative that no attorney gets the impression that in front of you certain attorneys cannot lose. *Eating with an attorney is more questionable than eating with a number of attorneys. Any social appearance with attorneys engaged in litigation before you is a grave error.* *** "I think my conclusions are obvious." [Emphasis added.]

D. Cowans, "Problems of Ethics for Referees," *Proceedings of Second Seminar for Referees in Bankruptcy* (1965) at pp. 20-21, 23.

Without peradventure of doubt breakfast by the referee and trustee on September 20, 1977 immediately before the continued hearing of the 60(b) motion was improper, and highly so.

5. *Misrepresentations of Material Fact.*

The referee was not under oath. Nevertheless new Canons 1 and 2A [App. 192] provide a binding ethical precept: an honorable judiciary. The referee stated on March 6, 1978 that "I don't have breakfast in Atlanta, Georgia with anybody. . . . ", (T65) but the trustee's co-counsel stated in oral argument, April 14, 1980 at a court of appeals' rehearing that the referee and the trustee had breakfasted together September 20, 1977 immediately before a 60(b) hearing. Also, the referee denied that Aetna's lawyer drafted a 40-page opinion in the 60(b) case. Aetna's counsel, R. W. Ide III, stated at the same oral argument, April 14, 1980, that the referee called his firm and asked it to prepare an order-opinion denying the 60(b) motion; and the firm complied. The pernicious effect of these misrepresentations is analyzed in the fee petition.

6. *Intentional Distortions of Fact*

> "One of the worst forms of judicial behavior is the subtle distortion of the facts, just enough that certain rules of law as the referee conceives them will apply."

R. L. Hiller, "Problems of Judicial Ethics for Referees in Bankruptcy," *Proceedings of Fifth Seminar for Referees in Bankruptcy* (1968) at 6. The 40-page opinion written by Aetna's attorney in the 60(b) case and the 37-page similarly-written opinion contains numerous distortions of fact. One is illustrative; others are given in footnote form in Statement of the Case.

The most serious substantive distortion concerns petitioners' basic claim, to wit: Aetna is estopped to deny that it is a receiver of a voidable or fraudulent conveyance from the bankrupt; the estoppel is an equitable estoppel; and it works on Aetna's receipt whether or not under an otherwise duly perfected security interest under *Ga. Code Ann.* Section 109A-9—101 et seq., and any underlying indebtedness. The equitable estoppel is invoked as a matter of law because of Aetna's bad faith toward the bankrupt. The bad faith conduct takes two forms: One type of conduct is reneging on a promise to transmit that portion ($26,000) of a third party check ($60,560) representing fire insur-

ance proceeds upon equipment owned by Roberts which had been employed in the cash-intensive operation at Forest Park.

A second type of bad faith conduct was requiring Forest Park to sign a new set of loan documents dated January 7, 1974, which purportedly granted to Aetna a security interest in Forest Park's equipment when that equipment (a) was not owned by Forest Park but by Roberts, (b) had been previously (December 31, 1973) destroyed by fire, all of which was known to Aetna, which intended to use the purported security interest to justify its secretly conceived plan not in fact to transmit fire insurance proceeds regarding the equipment to the bankrupt (for re-transmission to Roberts) as Aetna said it would. The impact of both acts of bad faith fell on the bankrupt rendering it hopelessly insolvent. It is not essential that the loan be to Paneling.

In the 60(b) opinion, Aetna wrote for the bankruptcy judge that petitioners had sought damages from Aetna for its lack of good faith, that *Ga. Code Ann.* 109A-1-103 was directory, not mandatory, and did not create a cause of action for bad faith. The estoppel argument was not mentioned nor was *Central Soya Co., Inc. v. Bundrick,* 137 Ga. App. 63, 222 S.E.2d 852 (1975). That the bankruptcy judge and Aetna were aware of petitioners' real argument not only appears from the September 19, and 20, 1977 hearing transcripts and petitioners' brief filed October 11, 1977 pursuant to direction, but the argument had been made to the district judge in *Pennington v. Aetna in defense to Aetna's motion for summary judgment.* See Order, March 30, 1978, denying Aetna a summary judgment. App. 142.

7. *Assistance to Aetna to Assure Victory on $600,000.00 Counterclaim in Plenary Action.*

As reprehensible as the referee's actions to cause a $36,000 transfer payment from petitioners to respondents, is the effort to cause ultimately a $600,000 transfer payment from petitioners to Aetna. A *comparsion* of Aetna's counterclaim filed October 25, 1977 *with* Aetna's lawyer's 40-page bankruptcy opinion shows that the latter helps to establish by the doctrine of stare decisis, if not collateral estoppel or merger and bar (i.e. res judicata), the material contentions of the counterclaim. A plainer case of fraud, on both courts and petitioners, is hard to imagine.

E. Irrelevance of Petitioners' Missteps to Exercise of Supervisory Powers

> " . . . [T]he supervisory power . . . is applied in part to protect the integrity of the *court* rather than to vindicate the constitutional rights of the defendant. . . ."

United States v. Payner, ___U.S. ___, 48 U.S.L.W. 4829 at 4832 (n8) (1980). Petitioners' constitutional right is to an impartial judge, *Tumey v. Ohio*, 273 U.S. 510 (1927); *Chapman v. California*, 386 U.S. 18 (1966) (dictum).

Where impairment of one's constitutional rights permits a due exercise of supervisory power, *United States v. Payner, supra*, the power is directed to eradicating the illegal conduct which impairs the integrity of the federal court. Beneficial impact on one's constitutional rights is incidental. In the same vein petitioners' alleged missteps in the instant case are irrelevant to the Court's exercise of supervisory power since petitioners have not engaged in illegal conduct.

F. Extent of Remedies

This Court has ruled similar conduct voids previous proceedings. *Ensminger v. Powers*, 108 U.S. (11 Wall) 292 (1883); *Hazel-Atlas Co. v. Hartford Empire Co.*, 322 U.S. 238 (1943); *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946).

VIII. FEDERALISM AND COMITY REQUIRE FEDERAL COURTS TO ADOPT ETHICAL PRECEPTS ESTABLISHED BY STATE COURTS FOR STATE JUDGES, AT LEAST IN JUDICIAL CIRCUITS IN WHICH SAID STATES LIE.

A. Introduction.

Nothing in *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964) or *United States v. Crescent Amusement Co.*, 323 U.S. 173 (1944), indicates that the findings and conclusions at issue were submitted to the trial judges *ex parte*. By contrast, Florida state courts seemingly will not allow a state judge mechanically to adopt party-prepared findings and conclusions whether or not submitted *ex*

parte. In re Dekle, 308 So.2d 5 (Fla. 1975); *In re Boyd*, 308 So.2d 13 (Fla. 1975). United States judges and Florida judges, alike, are bound to follow an identical Code of Judicial Conduct. A conflict thus appears between judicial enforcement of the ethical precepts in the federal judiciary and in the State of Florida. The precepts of the State of Georgia would appear to be nearly as stringent as Florida's. *Infra*.

B. **Hypothesis.**

Quaere: a federal district judge in Florida should rule that a Florida civil rights statute, sponsored by the Florida governor and his majority political party, violated the Equal Protection Clause of the Fourteenth Amendment. Assume further that the district judge's opinion was entered after a jury verdict consistent with the position taken by the governor, causing the jury verdict to be set aside. Take as given that the opinion was written by an individual whose civil rights were affected by the Florida statute, or by his attorney. Now suppose that the true authorship of the opinion should be disseminated to the public by the mass media.

C. **Federalism and Comity.**

It would be an understatement to say there would be public agitation. Citizens of Florida and their duly elected officials would cry "foul," for their own state judges would be removed from office for such conduct. *Cf. In re Dekle, supra*, and *In re Boyd, supra*. Georgia citizens, after noting that a referee in bankruptcy is subject to its Code, 231 Ga. A-14 (1973), would do likewise. *Cf. In re Broome*, 245 Ga. 227, ___ SE2d ___, (1980); *Gray v. Barlow*, 241 Ga. 347, 245 SE2d 229 (1978); *Smith v. State*, 239 Ga. 477, 238 SE2d 30 (1977).

Discord and disharmony have been studiously avoided by all federal officials since the founding of the republic, with exception for civil war and misguided federal judicial doctrine. On the latter subject, the doctrine of *Swift v. Tyson*, 16 Pet. 1 (1842), was first ameliorated by a doctrine of comity, *Mutual Life Ins. Co. v. Johnson*, 293 U.S. 335 (1934), and then repudiated by *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). Today, in diversity actions

the substantive law is state law. In federal question cases, state law is the substantive law unless the *issue* is governed by federal statute or an intent has been expressed by Congress to preempt the field.

On the subject of adjectival law, the Conformity Act of 1872 was followed in actions at law until 1938 when the Federal Rules of Civil Procedure were approved pursuant to the Rules Enabling Act. Since *Sibbach v. Wilson & Co.*, 312 U.S. 1 (1941), the question has been whether a federal rule violates the Rules Enabling Act by affecting the substantive rights of the aggrieved. It is now clear, however, that a federal court is to follow a federal rule even if it will produce a different outcome than following a state procedural rule, so long as the federal interest outweights the state's interest. *Hannah v. Plumer*, 380 U.S. 460 (1965).

Petitioners' research has not uncovered any case assessing a federal judge's behavior under state law, although Georgia's Code of Judicial Conduct (as others adopted without change from the original) purports to do so. 231 Ga. A-13. Dictum in *Nudd v. Burrows*, 91 U.S. 426 (1875), states that "[t]he personal conduct and administration of the judge in the discharge of his separate function" is outside the Conformity Act of 1872. Yet the case concerned the propriety of a trial judge's comments to the jury about the weight of the evidence, and not acts of dishonor.

D. **Good Behavior.**

Art. III, Section 1 provides that "judges . . . shall hold their offices during good behavior. . . .", but the expression is not defined. Nor is it defined in Art. I, Section 3, pertaining to impeachment, the method by which judges (as well as presidents) are removed from office for bad behavior. *The Federalist*, No. 78 (Hamilton) suggests that lack of arbitrariness (p. 510) and adherence to "truth and propriety" (p. 507), "integrity" (p. 511), "fit character" (p. 511) and "dignity" (p. 511) are components of "good behavior." *The Federalist*, No. 79 contemplates that federal judges will "behave properly." (p. 513).

One reason federal judges were given life tenure for good behavior was the perceived inadequacy of State judges. Hamilton in urging that Congress should establish inferior federal courts rather than rely on state courts to adjudge "causes arising out of the national constitution" might be

saying at p. 528 that a state judge's bending to "a local spirit" in matters of national importance is a form of behavior to be guarded against – "bad behavior" if you will. However, what may be involved in the instant case is a federal judge who is subject to "a local spirit." In Florida, the State judges are required to exercise independence to a much higher degree than Federal judges. This is the reverse of the danger perceived by Hamilton.

A comparison of *Federalist* No. 65 pertaining to the nature of impeachment under Art. I with *Federalist* No. 78 pertaining to Art. III judges suggests that *"high character"* is expected of federal judges but not necessarily other government officials. Should this expectation be different if the Art. I official is a judicial officer, as a magistrate, a referee in bankruptcy or a bankruptcy judge? The answer is, Negative, because the standard for removing a referee at the critical dates involved was "incompetency, misconduct, or neglect of duty" (Sec. 34, Act of 1898) which might be a higher standard than good behavior. For example, the *Federalist* No. 79 opposed a provision to remove federal judges for "inability;" arguably a federal judge cannot be removed for incompetency. It is not apparent that every "neglect of duty" is bad behavior. Since referee's findings of fact are accorded the clearly erroneous rule, they should be held to the same ethical precepts as Art. III judges.

E. **Conclusion of Interests Analysis.**

Most federal judges are lawyers first licensed by the states in which they reside. They would be presumed to have grown up with the Canons of Legal Ethics and/or the Code of Professional Responsibility regarding the public role of counsel. They would also be familiar with the Canons of Judicial Ethics and/or the Code of Judicial Conduct. While some of their brother lawyers became state court judges, they were appointed federal judges. This turn of events should not permit the latter to uphold the Supreme Law of the Land with a more casual, ethical attitude than brother state judges. Since state judges adjudge causes arising under the federal judicial power, they should have standards no lower than federal judges. Where ethical standards are higher, the federal judges should be held to those higher standards so that the

supremacy of federal law will be anchored in superior ethics as well as superior national importance. The nation does not need or deserve the strain posited by the hypothetical and posed by the wrong interpretation of the instant case.

IX. PROCEEDING BEFORE BANKRUPTCY JUDGE WHOSE IMPARTIALITY MIGHT REASONABLY BE QUESTIONED DEPRIVED PETITIONERS OF FIFTH AMENDMENT DUE PROCESS AND WAS VIOLATION OF 28 U.S.C.A. SEC. 455

A. Type of Constitutional Deprivation

1. *Lack of Impartial Tribunal.*

The Supreme Court has stated in dictum that — "[O]ur prior cases have indicated that there are some constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error . . ."
— at which point a footnote cites to: "*Tumey v. Ohio,* 273 U.S. 510 (impartial judge)." *Chapman v. California,* 386 U.S. 18 at 23 and n8 (1966). Another indication of the indispensable requirement of an impartial decisionmaker is *Commonwealth Coatings Corp. v. Continental Casualty Co.,* 393 U.S. 145 (1968), which reversed a First Circuit affirmance of an arbitration award on the ground that a pecuniary interest of a third arbitrator, chosen by each litigant's arbitrator, invalidated the proceedings, quoting old Canon 33 of the Canons of Judicial Ethics.

The issue is whether petitioners are required under *Tumey v. Ohio, supra,* to establish that the bankruptcy judge is actually partial. The answer is, No, because partiality bespeaks judgment governed by bias or prejudice. *Tumey v. Ohio* merely involved a state justice of the peace whose compensation would be affected in small degree by the judgment he would render in respect of Tumey. No bias or prejudice was alleged or proven. Although no pecuniary interest can be proven, petitioners' proof of other facts – taken in connection with admisssions *in judico* – should suffice to establish mandatory disqualification. *Rapp v. Van Dusen,* 350 F.2d 806 (3rd Cir. 1965). *Cf. Ward v. Village of Monroeville,* 409 U.S. 57 (1972); *In re Murchison,* 349 U.S. 133 (1955). See, generally, Comment, *Disqualifi-*

cation for Interest of Lower Federal Court Judges: 28 USC Sec. 455, 71 Mich. L. Rev. 538 (Jan. 1975).

2. *Lack of Fair Notice.*

Roadway Express, Inc. v. Piper, _____ US _____, 48 USLW 4836 (1980), establishes that attorneys' fees may be awarded by an Art. III court against a litigant or his attorney and states:

> "Like other sanctions, attorneys' fees certainly should not be assessed lightly or *without fair notice* and an opportunity for a hearing on the record." 48 USLW at 4840. [Emphasis added].

Petitioners' attorney did not receive fair notice because (a) no motion was filed to seek an award against him personally, (b) an oral motion by Aetna to seek award against him personally was orally withdrawn in the same hearing in which made, (c) the bankruptcy judge at the end of the same hearing announced orally his decision to award some amount of attorneys' fees against petitioners but said "certainly" that petitioners' counsel was not included. Thus petitioners' counsel had no opportunity to hire his own counsel or timely to advise corporate petitioners of the wisdom of their hiring other counsel or co-counsel.

Moreover, petitioners as a group did not receive fair notice of the large amount sought against them prior to commencement of the proceedings. The first day of hearing was September 19, 1977. The second day of hearing was February 14, 1978 when the bankruptcy judge announced his decision to hold them liable. After the second day and before the third day of hearing, March 6, 1978, time slips were furnished which when combined with motion papers indicated the sum was close to $40,000.00. Petitioners could not request a jury trial, a discretionary right in bankruptcy.

B. **Jury Trial Right**

Petitioners seek a jury trial "to guard against bias or mistake." *Muniz v. Hoffman,* 45 L.ed.2d at 335-336 (1977). Jury trial in bankruptcy under the Act of 1898 was not unknown. Petitioners' request this Court to extend this right under the Fifth Amendment, even if it should not rule the judge disqualified. That the process due requires a jury trial is reached upon an analysis suggested in *Mathews v. Eldridge,* 424 U.S. 319 (1975).

X. CONCLUSION

As a captain of a ship, or a teacher in a classroom, a judge sets the moral tenor for his courtroom. Default of leadership encourages discord, occasionally misbehavior.

For 190 years this Court has exercised the judicial power of the United States on the highest ethical plane. The Court, and the Nation, have survived judicial decisions altering fundamental aspects of everyday life. Without an enforcement arm of its own, the Court has enjoyed compliance with its decisions, often voluntary, assuring a Rule of Law throughout the land.

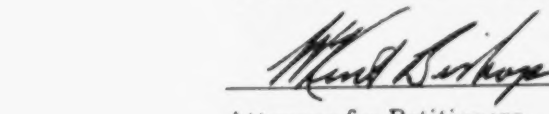
The instant case is not so much distasteful as opportunity to express the Court's view of judicial ethics; inculcation by example has not met with complete success as evidenced by 1974 legislation, recent bills and increasing numbers of such cases coming to the Court.

As corporate citizens, petitioners are somewhat unwitting actors in this drama. They question the expenditure of large sums to vindicate basically a problem of the public weal; but they, too, realize that corporate citizenship has its obligations. Perhaps the coincidence of corporate involvement has made possible the presentation of these petitions.

Petitioners urge the Court to grant the writ to vindicate the integrity of federal courts from the ambiguities of the written word. As with those published decisions, so too with this Court: "The sentence of today will make the right or wrong of tomorrow." B. Cardozo, *The Nature of the Judicial Process* (1921) at 21.

Respectfully submitted,

WINFORD KENT BISHOP



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XI. CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit and Petitioners' Joint Appendix upon each respondent by depositing same in the United States Mail, sufficient postage prepaid, properly addressed to counsel at their last known addresses.

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This 2 day of September, 1980.

W. Kent Bishop

80-344

No. 80-345

Supreme Court, U. S.
FILED
SEP2 1980
MICHAEL RODAK, JR., CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

QUINAULT PACIFIC CORPORATION,
INTERNATIONAL PAPER COMPANY,
WHITE LUMBER SALES, INC., and
GOLD REY FOREST PRODUCTS, INC., Petitioners,

versus

AETNA BUSINESS CREDIT, INC., and
JOHN C. PENNINGTON, TRUSTEE, Respondents.

QUINAULT PACIFIC CORPORATION, et al., Petitioners,

versus

AETNA BUSINESS CREDIT, INC., et al., Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

PETITIONERS' JOINT APPENDIX

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MEMORANDUM DECISIONS
Cite as 616 F.2d (1980)

In the Matter of
GEORGIA PANELING SUPPLY, INC.
Bankrupt.
INTERNATIONAL PAPER COMPANY
White Lumber Sales, Inc., Quinault Pacific Corporation and Gold Rey Forest Products, Inc., Appellants,
v.
JOHN C. PENNINGTON
Trustee and Aetna Business Credit, Inc., Appellees.
No. 79-1076.

United States Court of Appeals, Fifth Circuit.

May 8, 1980.

Appeal from the United States District Court for the Northern District of Georgia; RICHARD C. FREEMAN, Judge.

Winford Kent Bishop, Atlanta, Ga., Ben R. Swank, Jr., Kansas City, Mo., for appellants.

Douglas L. Cronkright, C. Edward Dobbs, R. William Ide, III, John C. Pennington, Atlanta, Ga., for appellees.

Before HATCHETT and TATE, Circuit Judges and GROOMS*, District Judge.

PER CURIAM:

Rehearing was granted, 613 F.2d 137 (5 Cir. 1979), vacating our panel opinion, 607 F.2d 117 (5 Cir. 1979), which had affirmed the ruling of the district court. The district court affirmed the bankruptcy court's denial of the appellant's Fed.R.Civ.P. 60(b) motion seeking relief from a judgment of the district court approving a settlement by the trustee previously approved by the bankruptcy court. After reviewing the contentions of the appellants once again in the light of the record, we reinstate the prior panel opinion. The appellee's motion for assessment of attorney fees against the appellants for frivolous appeal is denied.

AFFIRMED.

*District Judge of the Northern District of Ala., sitting by designation.

In the Matter of
GEORGIA PANELING SUPPLY, INC.
Bankrupt.

INTERNATIONAL PAPER COMPANY
White Lumber Sales, Inc., Quinault Pacific Corporation and Gold Rey Forest Products, Inc., Appellants,

v.

JOHN C. PENNINGTON
Trustee and Aetna Business Credit, Inc., Appellees.

No. 79-1076.

United States Court of Appeals, Fifth Circuit.

Dec. 28, 1979.

Appeal from the United States District Court for the Northern District of Georgia; Richard C. Freeman, Judge.

Winford Kent Bishop, Atlanta, Ga., for appellants.

Douglas L. Cronkright, C. Edward Dobbs, R. William Ide, III, John C. Pennington, Atlanta, Ga., for appellees.

Before GODBOLD, REAVLEY and ANDERSON, Circuit Judges.

BY THE COURT:

IT IS ORDERED that petitioners' motion for rehearing is GRANTED and the prior panel opinion, 607 F.2d 117, is hereby VACATED.

IF IS FURTHER ORDERED that this matter be placed upon the oral argument calendar.

In the Matter of
GEORGIA PANELING SUPPLY, INC.
Bankrupt.

INTERNATIONAL PAPER COMPANY
Hampton Lumber Sales Company,
White Lumber Sales, Inc., Quinault Pacific Corporation
and Gold Rey Forest Products, Inc., Appellants,

v.

JOHN C. PENNINGTON
Trustee and Aetna Business Credit, Inc., Appellees.

No. 79-1076.
Summary Calendar.*

United States Court of Appeals, Fifth Circuit.

Nov. 19, 1979.

A bankruptcy court denied a motion made by five unsecured creditors of bankrupt seeking relief from judgment approving settlement by trustee and creditor. The United States District Court for the Northern District of Georgia, Richard C. Freeman, J., affirmed. On appeal, the Court of Appeals held that: (1) allegations of misconduct on part of bankruptcy judge and district court judge were unfounded, and (2) unsecured creditors were not entitled to relief from judgment on ground of newly discovered evidence, misconduct, or any other reason.

AFFIRMED.

1. Federal Civil Procedure ##2662.

Allegations of misconduct on part of bankruptcy judge and district court judge involving denial of motion seeking relief from judgment approving settlement by trustee and creditor and affirmance of that judgment were unfounded.

2. Federal Civil Procedure ##2655

Where facts surrounding charges of impropriety should have been known to unsecured creditors prior to bankruptcy court's approval of settlement, such facts did not constitute newly discovered evidence so as to entitle unsecured creditors to relief from judgment of bankruptcy court approving settlement. Fed. Rules Civ. Proc. Rule 60(b)(2) 28 U.S.C.A.

3. Federal Civil Procedure ##2651

Allegations of misconduct by trustee and creditor with respect to judgment of bankruptcy court approving settlement were unsupported by record so as to entitle unsecured creditors to relief from judgment on grounds of misconduct of adverse party. Fed. Rules Civ. Proc. Rule 60(b)(3), 28 U.S.C.A.

4. Federal Civil Procedure ##2651

Unsecured creditors of bankrupt were not entitled to a relief from judgment of bankruptcy court approving settlement by trustee and creditor on general grounds. Fed. Rules Civ. Proc. Rule 60(b)(6), 28 U.S.C.A.

Winford Kent Bishop, Atlanta, Ga., for appellants.

Douglas L. Cronkright, C. Edward Dobbs, R. William Ide, III, John C. Pennington, Atlanta, Ga., for appellees.

Appeal from the United States District Court for the Northern District of Georgia.

Before GODBOLD, REAVLEY and ANDERSON, Circuit Judges.

PER CURIAM:

Appellants are five unsecured creditors of the bankrupt, Georgia Paneling Supply, Inc. Their current posture results from a denial by the bankruptcy court of their Fed. R. Civ. P. 60(b) motion seeking relief from a judgment

of that court approving a settlement by the trustee and Aetna Business Credit, Inc. ("Aetna"). On appeal, the district court affirmed the bankruptcy court. An earlier attempt to appeal to this court failed when leave to appeal was denied. *In re Georgia Paneling Supply, Inc.*, 581 F.2d 520 (5th Cir. 1978). Alleging judicial misconduct in the petition for rehearing, appellants then won leave to appeal and a vacation of the previous opinion. *In re Georgia Paneling Supply, Inc.*, 588 F.2d 93 (5th Cir. 1978).

The charges of judicial impropriety are that the bankruptcy judge demonstrated partiality, lacked judicial integrity, and made materially misleading statements. The bankruptcy judge is also alleged to have engaged in *ex parte* discussions with appellees and their counsel, permitted orders and an opinion to be drafted and typed by appellees or their counsel, and misrepresented the facts regarding this alleged misbehavior. Appellants also argue that the district judge's affirmance is entitled to no weight because he engaged in various acts of misbehavior.

[1] A careful examination of the record, especially those portions cited by appellants, reveals no impropriety. The allegations of misconduct are unfounded.

[2] Appellants also claim entitlement to relief pursuant to Fed. R. Civ. P. 60(b)(2), (3), and (6) for various other reasons. The petition for leave to appeal, which was denied earlier, focused upon alleged collusion between the bankruptcy judge, the trustee and counsel for Aetna. They now shift their attack under Rule 60(b)(2), and allege that Aetna wrongfully retained certain fire insurance proceeds and improperly seized collateral of the bankrupt. The facts surrounding both charges should have been known to appellants prior to the bankruptcy court's approval of the settlement. They do not constitute newly discovered evidence. Moreover, the claim that inventory collateral was wrongfully seized is improperly raised for the first time on appeal. *Pierre v. United States*, 525 F.2d 933, 936 (5th Cir. 1976).

[3] The request for relief under Rule 60(b)(3) is premised upon numerous allegations of misconduct by the trustee and Aetna. We find that the charges are either unsupported by the record or concern actions which did not prejudice appellants.

[4] Finally, Fed. R. Civ. P. 60(b)(6) will not afford appellants any comfort. First, this theory was abandoned earlier in this suit and is not properly before us on appeal. Appellants' first petition for relief under Rule 60(b) was made to the district court and included a request for relief under Rule 60(b)(6). That court denied relief. Upon petition for reconsideraton, the district court remanded to the bankruptcy court for a hearing on claims under Rule 60(b)(1), (2), and (3). Appellants never pressed a Rule 60(b)(6) claim after their initial petition in the district court until the instant appeal. *See Pierre, supra.* Moreover, the charges leveled under this final theory for relief are either conclusory or unsupported by the record.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

*Fed.R.App.P. 34(a); 5th Cir.R. 18

In the Matter of
GEORGIA PANELING SUPPLY, INC.
Bankrupt.

INTERNATIONAL PAPER COMPANY
Hampton Lumber Sales Company,
White Lumber Sales, Inc., Quinault Pacific Corporation
and Gold Rey Forest Products, Inc., Petitioners,

v.

JOHN C. PENNINGTON
Trustee and Aetna Business Credit, Inc., Repondents.

No. 78-8283.

United States Court of Appeals, Fifth Circuit.

Dec. 29, 1978.

Petition for Leave to Appeal from An Order Affirming Bankruptcy Court's Denial of a Rule 60(b) F.R.Civ.P. Motion; Richard C. Freeman, Judge.

Winford Kent Bishop, Atlanta, Ga., for petitioners.

Douglas L. Cronkright, C. Edward Dobbs, John C. Pennington, Atlanta, Ga., for repondents.

ON PETITION FOR REHEARING AND
PETITION FOR REHEARING
EN BANC

Before **GODBOLD, RONEY** and **RUBIN**, Circuit Judges.

ORDER:

Because of the allegations of judical misconduct contained in the petition for rehearing, the panel has decided that the rehearing should be granted, that the previous panel opinion, 581 F.2d 520, should be vacated, and that leave to appeal should be granted.

No member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED..

It is so ordered.

In the Matter of
GEORGIA PANELING SUPPLY, INC.
Bankrupt.

INTERNATIONAL PAPER COMPANY
Hampton Lumber Sales Company,
White Lumber Sales, Inc., Quinault Pacific Corporation
and Gold Rey Forest Products, Inc., Petitioners,

v.

JOHN C. PENNINGTON
Trustee and Aetna Business Credit, Inc., Respondents.

No. 78-8283.

United States Court of Appeals, Fifth Circuit.

Oct. 5, 1978.

The United States District Court for the Northern District of Georgia, Richard C. Freeman, J., affirmed the Bankruptcy Court's denial of a motion for a new trial. Petition for leave to appeal was filed. The Court of Appeals held that there was no compelling reason for further review and no showing of likelihood of success in such an eventuality.

Appeal denied.

1. Federal Courts ##660

Action upon motion for leave to appeal is entrusted to court's sound discretion. Fed. Rules App. Proc. rule 6, 28 U.S.C.A.

2. Federal Courts ##825

District court's determination on a motion for new trial will not be disturbed absent clear abuse of discretion. Fed. Rules Civ. Proc. Rule 60(b), 28 U.S.C.A.

3. Bankruptcy ##467(4)

On review, a judgment of district court affirming bankruptcy court's determination based on findings of fact will not be disturbed unless findings are clearly erroneous; such findings are presumptively correct where court considers conflicting evidence.

4. Bankruptcy ##252

Occurrence of ex parte conferences between bankruptcy judge, trustee, and lawyer alone do not demonstrate collusion in the approval of trustee's settlement of suit. 28 U.S.C.A. Sec. 455.

Winford Kent Bishop, Atlanta, Ga., for petitioners.

Douglas L. Cronkright, C. Edward Dobbs, Atlanta, Ga., for respondents.

John C. Pennington, pro se.

Petition for Leave to Appeal from An Order Affirming Bankrutpcy Court's Denial of a Rule 60(b) F. R. Civ. P. Motion.

Before GODBOLD, RONEY and RUBIN, Circuit Judges.

BY THE COURT:

Alleging the discovery of new evidence which could not by due diligence have been discovered in time to move for a new trial, petitioners sought relief in the bankruptcy court under Fed. R. Civ. P. 60(b)(2). Upon denial of their motion, they appealed to the district court which affirmed. They now petition this Court for leave to appeal. F.R.A.P. 6; 11 U.S.C.A. Sec. 47. Finding no claim which would warrant the exercise of our discretion to allow an appeal, we deny the petition.

[1] Action upon a motion for leave to appeal under Rule 6 is entrusted to the Court's sound discretion. *In re Hawkins Mortgage Co.*, 66 F.2d 16 (7th Cir. 1933), *cert. denied sub nom., Harter v. Wallace*, 291 U.S. 659, 54 S.Ct. 376, 78 L.Ed. 1051 (1934). Where, for example, the question presented is not of sufficient importance, leave to appeal has been refused. *New York Credit Men's Adjustment Bureau, Inc. v. David Strauss & Co.*, 296 F.2d 702 (2d Cir. 1961).

[2] In the instant case, we find neither procedural nor

substantive basis for further review. A determination on Fed. R. Civ. P. 60(b) will not be disturbed absent clear abuse of discretion. *Pagan v. American Airlines, Inc.*, 534 F.2d 990 (1st Cir. 1976); *Martin v. H.M.B. Construction Co.*, 279 F.2d 495 (5th Cir. 1960); *Darlington v. Studebaker-Packard Corp.*, 291 F.2d 903 (7th Cir.), *cert. denied*, 359 U.S. 992, 79 S.Ct. 1121, 3 L.Ed.2d 980 (1959). This standard, stringent upon an initial review, can only be more difficult to meet where a second review is sought. It has not been met here.

[3] Petitioners rest their claim of abuse upon what they view as the compelling merits of the case, thereby seeking to obtain a review of the merits on this motion. Upon review, a judgment of the district court affirming the bankruptcy court's determination based on findings of fact will not be disturbed unless the findings are clearly erroneous. *Sears, Roebuck & Co. v. Boydston*, 520 F.2d 1098, 1100 (5th Cir. 1975); *Porterfield v. Gerstel*, 249 F.2d 634 (5th Cir. 1957). Such findings are presumptively correct in a situation such as is here presented, where the lower court considers conflicting evidence.

[4] Petitioners have not demonstrated that there is clear error in the bankruptcy judge's approval of the trustee's settlement of the suit against Aetna Business Credit, Inc. The charges of collusion between the bankruptcy judge, the trustee, and the lawyer for Aetna are conclusional. Moreover, petitioners have failed to file an affidavit stating the facts and reasons for the belief that bias or prejudice exists and a certificate of counsel showing good faith as required by 28 U.S.C.A. Sec. 144. Neither have petitioners shown that there exists the requisite extrajudicial basis of prejudice and bias under 28 U.S.C.A. Sec. 455. *Davis v. Board of School Commissioners*, 517 F.2d 1044, 1052 (5th Cir. 1975), *cert. denied*, 425 U.S. 944, 96 S.Ct. 1685, 48 L.Ed.2d 188 (1976). The occurrence of *ex parte* conferences between the bankruptcy judge, the trustee, and Aetna's lawyer alone do not demonstrate collusion. *Martelli v. City of Sonoma*, 359 F. Supp. 397 (N.D.Cal. 1973).

In sum, where there is no compelling reason for further review and no showing of likelihood of success in such an eventuality, we decline to exercise our discretion to grant review. Accordingly, the motion for leave to appeal is denied.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: GEORGIA PANELING SUPPLY, INC.

B74-1628

[Filed June 26, 1978]

ORDER

This bankruptcy appeal is presently before the court on intervenors' appeal from the bankruptcy court's order of December 20, 1977, and opinion of January 5, 1978, denying the appellants' motion for relief from the bankruptcy court's order of June 17, 1976, approving the trustee's application to compromise and settle.

On August 25, 1977, this court remanded the action to the bankruptcy court solely for consideration of appellants' asserted grounds for relief under Rule 60(b)(1), (2) and (3), Fed. R. Civ. P. Specifically, the rule provides as follows:

> On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding from [sic] the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move from a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; . . .

The propriety of granting relief under all three of these subsections is addressed to the sound discretion of the court, *Hand v. United States*, 441 F.2d 529 (5th Cir. 1971) and must be balanced against the competing interest of achieving finality in litigation, *see In Re Casco Chemical Co.*, 335 F.2d 645 (5th Cir. 1964).

The major thrust of appellants' argument fell under the "newly discovered evidence" heading of Rule 60(b)(2). Un-

der this heading, the evidence must be "newly discovered" in the sense of not being in the possession of the movant before the order was entered, *see Kolstad v. United States*, 262 F.2d 839 (9th Cir. 1959). In addition, it must be not merely cumulative but rather such as probably would produce a different outcome and it must be evidence that could not have been discovered by "due diligence" prior to the hearing or in time to move for a new trial. *Flett v. W. A. Alexander & Co.*, 302 F.2d 321 (7th Cir.), *cert. denied*, 371 U.S. 841 (1962).

Appellants were afforded more than a full day to present their evidence. In an opinion measuring forty pages in length, the bankruptcy court carefully sifted the evidence and concluded that appellants could not carry their burden under any of the three pertinent subsections of Rule 60(b). Specifically, the bankruptcy court found *inter alia*: (1) that there was little or no evidence that the subject loan had been made to a sister corporation rather than to the bankrupt; and (2) that appellants' "newly discovered evidence" consisted not of new evidence but rather of different legal theories attached to the same facts. After a careful independent review of the evidence and the bankruptcy court's order of January 5, 1977 [sic], we cannot conclude that these findings of fact were "clearly erroneous." *See* Rule 810 of the Rules of Bankruptcy Procedure.

Accordingly, for the reasons hereinabove expressed, the bankruptcy court's order of December 20, 1977, and opinion of January 5, 1978, are hereby AFFIRMED.

IT IS SO ORDERED.

This, the 23rd day of June, 1978.

/s/ RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: GEORGIA PANELING SUPPLY, INC.

B74-1628

[Filed August 26, 1977]

ORDER

It has come to the attention of this court that, contrary to the representations of appellants' counsel at the in camera hearing held on July 19, 1977, the date upon which the challenged order was entered was June 17, 1976, rather than May 18, 1976. Accordingly, appellants' motion under Rule 60(b)(1), (2), and (3), Fed. R. Civ. P., which was made on May 31, 1977, was within the one year maximum period for the filing of such motions. *See* 7 J. W. Moore, *Moore's Federal Practice*, Sec. 60.22[4] (1977). In addition, we cannot say on the record presently before this court that the subject motion so prejudiced appellees as to warrant a finding that it was not otherwise filed within a reasonable time. *See* 11 C. Wright and A. Miller, *Federal Practice and Procedure*, Sec. 2866 at 229-230 (1971). Nevertheless, as we indicated in our previous order, appellants' factual allegations should be considered in the first instance by the bankruptcy judge who initially performed the function of fact finder in this action.

Accordingly, this court's order of July 22, 1977 insofar as it applies to appellants' motion under Rule 60(b)(1), (2) and (3) is hereby VACATED and the instant action is hereby ORDERED to be REMANDED to the bankruptcy court for an evidentiary hearing upon the question of whether appellants can carry their heavy burden of demonstrating grounds for relief under Rule 60(b)(1), (2) or (3) which would warrant setting aside the judgment of the bankruptcy court of June 17, 1976. If such grounds are found, the bankruptcy judge is hereby DIRECTED to enter the appropriate findings of fact and conclusions of law and to

apply to this court for leave to amend our mandate of affirmance to the extent that any conflict therewith may be found to exist.

IT IS SO ORDERED.

This, the 25th day of August, 1977.

/s/ RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of:

GEORGIA PANELING SUPPLY, INC.

Bankruptcy Case No. B74-1628A

[Filed July 22, 1977]

ORDER

This bankruptcy appeal is presently before the court on the motions filed by several unsecured creditors of the bankrupt under Rule 60(b), Fed. R. Civ. P., to relieve appellants from this court's order of April 15, 1977, affirming the bankruptcy judge's approval of the trustee's settlement. Appellant's original motion and four subsequent amendments rely upon grounds specified in Rule 60(b) including: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b), Fed. R. Civ. P.; (3) fraud, misrepresentation or other misconduct of appellees; and (4) other reasons allegedly justifying relief from the operation of the judgment.

At a hearing held in camera on July 19, 1977, threshold issues concerning the jurisdiction of this court and the timeliness of the subject motion were raised. Accordingly, this court will consider the subject of appellants' motion only if we first conclude that appellees' threshold arguments are without merit.

THE JURISDICTION OF THIS COURT TO ENTERTAIN APPELLANTS' MOTION UNDER RULE 60(b) FED. R. CIV. P.

Appellants argue in essence that, under the "plain meaning" of Rule 60(b), Fed. R. Civ. P., any court, including this court, sitting in its appellate function in the instant bankruptcy proceeding may vacate one of its prior

orders for any of the reasons specified in the rule. In addition, appellants argue that since the bankruptcy court in this district is not a separate court but rather a division of the district court, filing the subject motion in the district could not have been error.

Appellees in turn argue that a motion under Rule 60(b) must be filed in the court which entered "judgment"; in this case the bankruptcy court. The gravamen of appellees' argument is that when this court, sitting in an appellate function, affirmed the order of the bankruptcy court, it surrendered jurisdiction over the subject action in favor of the bankruptcy court. Therefore, while the bankruptcy court could not properly have revised its own judgment, or a fortiori that of the district court, without first obtaining the leave of this court, *Warner v. City of Bay, St. Louis,* 526 F.2d 1211 (5th Cir. 1976); *Graves v. Kaiser Aluminum and Chemical Co.,* 528 F.2d 1360 (5th Cir. 1976), the bankruptcy court was nevertheless the only court with jurisdiction to entertain the motion in the first instance. Accordingly, this court is directly confronted with the question of whether or not we have jurisdiction to entertain a motion to set aside a "judgment" or order of this court in a bankruptcy proceeding after this court has already affirmed the ruling of the bankruptcy judge upon appeal.

In *Dickerson v. Continental Oil Co.,* 476 F.2d 635 (5th Cir. 1973) the district court upon remand added interest to a judgment in favor of an intervening compensation carrier and the ruling was appealed. In a *per curiam* opinion the Court of Appeals suggested the proper procedure would be to direct a post-judgment-post-mandate request to the Court of Appeals. However, the court also noted that the result flowed from the mandate rather than from "any actual or supposed" restrictions on Rule 60(b) post-judgment relief. *Id.* at 636. Therefore, the court implicitly assumed that the trial court was the appropriate court in which to lodge the Rule 60(b) motion.

In *A. G. Pro, Inc. v. Sakaraida,* 481 F.2d 668 (5th Cir. 1973), a patent infringement action, a claim of newly discovered evidence under Rule 60(b)(2), Fed. R. Civ. P., was raised after the Court of Appeals rendered the decision but before the issuance of the mandate. The Court of Appeals then reaffirmed the decision but remanded the

action to the district court for consideration of the Rule 60(b)(2) motion. Therefore, the Court of Appeals essentially followed Dickerson once more and concluded that the trial court was the proper court in which to consider such an evidentiary allegation.

There is logic in the position which the Court of Appeals has adopted — especially when the gravamen of an appellants' motion is that newly discovered evidence within the meaning of Rule 60(b)(2) has become available. In the latter instance, the argument is not that any mistake of law or fact was made by the trial or appellate courts. Instead, the thrust of the argument is that the record below was inadequately developed and needs supplementation. Therefore, it would be incongruous and somewhat unseemly for the appellate court to usurp the function of the trial court by effectively taking additional evidence and then attempting to determine in the first instance what result that evidence mandates. Nevertheless, the foregoing case authority clearly suggests that once the trial court ruling is affirmed upon appeal, leave of the appellate court must be obtained before a Rule 60(b) motion may be entertained upon its merits. However, this court cannot definitively say in light of the divisional status of the bankruptcy court in this district, that appellants Rule 60(b) motion could not properly have been construed as a motion for leave to file a Rule 60(b) motion with the bankruptcy court. Accordingly, consideration of appellees' untimeliness argument is warranted.

THE TIMELINESS OF APPELLANTS' RULE 60(b) MOTION

Appellants putative claims sound under Rule 60(b) Sections (1), (2), (3) and (6). At the in camera hearing held on July 19, 1977, appellants admitted that the judgment of which they complain was entered on May 18, 1976, and that the subject motion was not filed until May 31, 1977.

> The second sentence of Rule 60(b), Fed. R. Civ. P. states that [sic]:
>
> The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken.

Authorities agree that the "reasonableness" requirement operates only within the one year period and that one year is a maximum time beyond which no proceeding under this clause can be maintained. *Bershad v. McDonald*, 469 F.2d 1333 (7th Cir. 1972); *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268 (D.C. Cir. 1971); 11 C. Wright and A. Miller, *Federal Practice and Procedure*, Sec. 2866 at 232 (1971). Accordingly, this court may not consider the merits of appellants claims under Rule 60(b) Sections (1), (2) and (3).

Appellants' sole remaining claim upon the merits is that there are "other reasons" within the meaning of Rule 60(b)(6) which justify relief in the instant action. It is clear under this clause that the sole limitation upon the timeliness of such a motion is reasonableness, *Armor & Co. v. Nard*, 56 F.R.D. 610 (D.C. Iowa 1972); 11 C. Wright and A. Miller, *Federal Pratice and Procedure*, Section 2866 at 232 (1971), and that the court must consider whether relief under clause (6) will further justice without affecting substantial rights of the parties. *U.S. v. Cato Brothers, Inc.*, 273 F.2d 153 (4th Cir. 1959). In the instant action, this court, in the exercise of its discretion, *see* 11 C. Wright and A. Miller, *Federal Practice and Procedure*, Sec. 2857 (1971), is not persuaded that appellants can meet the foregoing test.

First, a perusal of the argument and documents submitted by appellants, reveals that regardless of how they attempt to characterize their claims, appellants have demonstrated at most newly discovered evidence rather than the extreme circumstances which make relief under Rule 60(b)(6) appropriate. *Klapprott v. United States*, 335 U.S. 601 (1949) (incarceration during the period of the action resulting in a default judgment cancelling appellants' naturalization certificate); *United States v. Karahalias*, 205 F.2d 331 (2nd Cir. 1953) (absence from the country and an intervening war prevented appellant from defending a denaturalization proceeding); *Menjer v. United States*, 405 F.2d 245 (5th Cir. 1968); *Brothers, Inc. v. W. E. Grace Manufacturing Co.*, 320 F.2d 594 (5th Cir. 1963); *Crane v. Kerr*, 53 F.R.D. 311 (N.D. Ga. 1971).

Second, the better view is that clauses (1) through (3) and clause (6) present grounds which are mutually exclu-

sive. Therefore, appellants may not accumulate charges under the former sections and allege that they amount to a violation of the latter. *Transit Casualty Co. v. Security Trust Co.*, 441 F.2d 788 (5th Cir. 1971), *cert. denied*, 404 U.S. 883; *Gulf Coast Building & Supply Co. v. International Board of Electrical Workers, Local 480, ALF-CIO*, 460 F.2d 105 (5th Cir. 1972). In addition, appellant should not be allowed to use the subject Rule 60(b)(6) motion as a substitute for the appeal which appellants failed to timely file. *See* 7 J. W. Moore, *Moore's Federal Practice*, Section 60.18[8] (1976).

Finally, we must conclude that the interests of justice would not be served by considering and granting appellants' motion under Rule 60(b)(6). Appellants asserted at the in camera hearing on July 19, 1977 that the main body of this action which was not affected by the challenged order is nearly ready to be tried and that appellants have individual actions presently pending against Aetna Business Credit, Inc. In view of these circumstances, we must conclude alternatively that appellants' motion was not filed within a "reasonable time" and/or that the motion is now barred by laches. The foregoing decision pretermits consideration of appellants' motion upon the merits.

Accordingly, for all the reasons hereinabove expressed, appellants' motion for relief from judgment under Rule 60(b)(1), (2), (3) and (6), Fed. R. Civ. P. is hereby DENIED.

IT IS SO ORDERED.

This, the 22nd day of July, 1977.

/s/ RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: GEORGIA PANELING SUPPLY, INC.
B74-1628A

[Filed June 15, 1977]

ORDER

On April 15, 1977, this court entered an order in an appeal from the bankruptcy court affirming the bankruptcy judge's order approving the trustee's application to compromise and settle the bankrupt's claims against Aetna Business Credit, Inc. in a plenary action pending before this court styled *Pennington, Trustee v. Aetna Business Credit, Inc. et al.*, Civil Action No.75-1540A. The action is presently pending before this court on motions filed by several unsecured creditors of the bankrupt (1) for an extension of time in which to file a notice of appeal from this court's order until June 15, 1977, and further (2) upon such creditors' "motion to relieve appellants from the order of April 15, 1977, affirming the bankruptcy judge's approval of the trustee's settlement," filed pursuant to Rule 60(b).

In support of their motion to extend time for appeal, the putative appellants rely on three grounds: (1) excusable neglect; (2) misconduct by an adverse party in the related plenary acton; and (3) the interest of a just, speedy, and inexpensive determination of the issues involved. At the outset, it appears that both parties agree as to the applicability of Rule 4(a), Fed. R. App. P., which provides that in appeals taken as of right, a notice of appeal must be filed with the clerk of the district court within 30 days from the date of the judgment or order appealed from. However, Rule 4(a) also allows the district judge, in the exercise of his discretion, to extend the time for filing the notice of appeal an additional thirty days upon a showing of "excusable neglect."

The parameters of what facts and circumstances constitute excusable neglect is not entirely clear; however, resort to the historical development of the instant rule is appropriate. Prior to 1966, former Rule 73(a), Fed. R. Civ. P., authorized a district court to extend the time for appeal only "upon a showing of excusable neglect based on a failure of a party to learn of the entry of judgment." While it is clear that a finding of excusable neglect is not restricted solely to the foregoing ground, it is likewise clear, as observed by the Advisory Committee on the Federal Rules in 1966, that "the district court should have the power to permit the notice to be filed out of time [only] in extraordinary cases where injustice would otherwise result." Professor Moore, relying on the examples accompanying former Rule 37(a)(2), Fed. R. Crim. P., posits the following illustrations of what may constitute "excusable neglect" for purposes of allowing an out-of-time appeal:

> disability of the person to whom the notice has been entrusted for filing by reason of sudden illness; . . . unusual and uncontrollable delay in transmission by mail . . . death of a party entitled to appeal before appeal is taken, or the death or disablity of the attorney for a party under circumstances which might prevent the timely filing of a notice of appeal.

J. W. Moore, *Moore's Federal Practice*, Sec. 204.13[1] at 972-73 (1976).

It is clear, however, the mere negligence on the part of an attorney, i.e., where a heavy workload causes him to overlook the time for filing an appeal does not constitute excusable neglect warranting relief from the thirty-day filing requirement. *E.g., Maryland Casualty Co. v. Conner*, 382 F.2d 13 (10th Cir. 1967); *Buckley v. United States*, 382 F.2d 611 (10th Cir.) *cert. denied*, 390 U.S. 996 (1967). Likewise, counsel's lack of familiarity with local practice or his misreading of procedural rules does not constitute excusable neglect. *E.g., Buckley v. United States, supra; Harlan v. Graybar Electric Co.*, 442 F.2d 425 (9th Cir. 1971).

While we have found no case precisely on point, the facts herein are somewhat similar to those in *Gann v. Smith*,

443 F.2d 352 (5th Cir. 1971). In *Gann*, the Fifth Circuit dismissed an appeal, holding that the trial judge had abused his discretion in extending the time for filing a notice of appeal. The court observed that the State Attorney had not been guilty of "neglect" of any kind, but that he deliberately and voluntarily made a decision not to appeal the case, adhered to it until after the initial thirty days had expired, and thereafter sought an extension of time to appeal. The Fifth Circuit concluded that the fact that the respondent changed his mind was not the equivalent of excusable neglect for purposes of Rule 4(a).

The facts herein are somewhat less convincing with respect to extending the time for appeal. Unlike *Gann*, it is not even clear to this court that the putative appellants intend or desire to take an appeal from this court's order. On the contrary, it appears that the course of action that they prefer is to have this court vacate its April 15 order if it finds that there are genuine and substantial issues of material fact and of law raised by its Rule 60(b) motion, and, then, thereafter, proceed to dispose of the merits of the 60(b) motion in a less hasty fashion. The purpose of this circuitous procedure is to "obviate a protective appeal." The would-be appellants cite no cases approving of this rather novel suggested procedure, and indeed, we do not believe that the Federal Rules compel such a result, nor will the interests of justice and judicial economy be served thereby. Likewise, we find that the putative appellants have not shown any facts or circumstances upon which a finding of "excusable neglect" in failing to timely file a notice of appeal might be predicated. At most, the purported delays attributable to Aetna or the other defendants in the plenary action which prohibited prompt discovery of the newly found evidence would only be relevant to consideration of whether we should reach the merits of their Rule 60(b) motion and do not compel a finding of excusable neglect within the meaning of Rule 4(a). *Cf. Files v. City of Rockford*, 440 F.2d 811 (7th Cir. 1971). The continuing hedging of the putative appellants as to whether or not they desire or intend to appeal certainly does not constitute mere neglect excusing them from failure to file a timely notice of appeal, but constitutes a mere tactical dilemma. *See, e.g., Gann v. Smith*,

supra; Linabary v. Maritime Overseas Corp., 376 F. Supp. 688, 689 (S.D. N.Y. 1973). *See also Dyotherm Corp. v. Turbo Machine Co.*, 434 F.2d 65 (3rd Cir. 1970).

On the other hand, the alleged "Catch 22" dilemma in which they contend they find themselves is not the sort of extraordinary case where injustice would otherwise result if an appeal were not taken. It appears to this court that the appropriate procedural approach is to have this court consider the merits of the unsecured creditors' Rule 60(b) motion. Any order refusing relief under Rule 60(b) would itself be an appealable order, with the result that the putative appellants' remedies will not be forfeited thereby.

Accordingly, for the reasons hereinabove expressed, the motion filed by several of the bankrupts unsecured creditors for an extension of time in which to file a notice of appeal is hereby DENIED. It is hereby ORDERED that the matter of the unsecured creditors' motion for reconsideration be set down for a hearing before the undersigned on the 19th day of July, 1977, at 10:00 A.M. in Room 522, United States Courthouse, Atlanta, Georgia.

IT IS SO ORDERED, this 13th day of June, 1977.

/s/ RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt

Bankruptcy Case No. B74-1628A

[Filed December 20, 1977]

ORDER

For the reasons set forth in an Opinion of this Court to be hereafter filed, it is hereby

ORDERED that the Motion of International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Versapanel, Inc. and White Lumber Sales, Inc. (hereinafter collectively referred to as "Appellants") for relief under Rule 60(b)(1), (2) and (3) of the Federal Rules of Civil Procedure, which Motion was remanded to this Court for determination by order of the Honorable Richard C. Freeman, U. S. District Judge, on August 25, 1977, be, and the same hereby is in all respects, DENIED; and it is

FURTHER ORDERED that a hearing on the Application of Aetna Business Credit, Inc. for an assessment of expenses incurred by it on appeal and on the Application of the Trustee for an assessment of expenses incurred by him on appeal shall be heard before this Court at 2:00 o'clock p.m., on the 19th day of January, 1978, in Room 546 of the U. S. Courthouse, 56 Forsyth Street, Atlanta, Georgia; and it is

FURTHER ORDERED that Appellants shall bear all costs incurred in connection with the hearing on their Motion.

The time for appeal from this Order shall run from the date of entry of the Opinion to be filed in connection herewith.

SO ORDERED in Atlanta, Georgia, this 20th day of December, 1977.

/s/ WILLIAM L. NORTON, JR.
UNITED STATES BANKRUPTCY JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt

In Bankruptcy No. B74-1628A

[Filed: September 23, 1977]

ORDER

At the hearing before this Bankruptcy Court on September 19, 1977, on the objecting creditors' Rule 60(b) motion remanded to this Court for hearing by Order of United States District Court Judge Richard C. Freeman, John C. Pennington, duly appointed Trustee for the captioned Bankrupt, on oral motion requested this Court to consider amendment of its Order of September 16, 1977, and the objecting creditors placed before this Court three written motions for consideration, being: (1) Notice of Appeal and Request for Immediate Review; (2) Motion for a Stay Pending Appeal; and (3) Motion to Reassign Case.

After hearing oral argument by counsel for the parties, the Court ruled:

Trustee's Motion to Amend Order of September 16, 1977

In accord with its intention announced to the parties on September 16, 1977, to clarify its Order of that same date,

IT IS ORDERED that the last three lines of the last full paragraph preceding the date be amended to read as follows:

> ". . . Motion, and as to 'newly discovered evidence' under Rule 60(b)(2), that which necessarily could not have been discovered by due diligence in time to move for a new trial under Rule 59(b), or a rehearing under Bankruptcy Rule 923."

Notice of Appeal and Request for Immediate Review

The objecting creditors' Notice of Appeal and Request for Immediate Review was brought to the attention of this Court to indicate its filing and to provide the basis for the objecting creditors' motion, which next follows.

Motion for a Stay Pending Appeal

The parties being present with witnesses and ready to proceed, the objecting creditors' motion under Rule 805 of the Rules of Bankruptcy Procedure was DENIED, it appearing that such denial would best serve to protect the rights of all parties in interest, the objecting creditors' having been advised by this Court that they will be afforded such time or periods of time as may be necessary to permit a full hearing of evidentiary matters which are admissible and appropriate in the consideration of a Rule 60(b) motion.

Motion to Reassign Case

For the reasons appearing in the foregoing denial of the objecting creditors' motion under Bankruptcy Rule 805, and it further appearing that this Court has heard evidence and arguments of counsel for a period of at least five hours, with additional time for hearing being presently set, this Court would DENY objecting creditors' motion to reassign the case. Moreover, this Court is subject to the United States District Court's Order of remand, dated August 26, 1977, and is without authority under Rule 102 of the Bankruptcy Rules of Procedure to reassign the case.

SO ORDERED this 19th day of September, 1977.

/s/ WILLIAM L. NORTON, JR.
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE: GEORGIA PANELING SUPPLY, INC.,
Bankrupt

Case No. B74-1628A

[Filed September 16, 1977]

ORDER

Certain creditors of the referenced Bankrupt, International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Versapanel, Inc., and White Lumber Sales, Inc., appealed from the Order of this Bankruptcy Court entered on June 17, 1976, approving the settlement by the Trustee of a controversy with Aetna Business Credit, Inc. After affirmance of said Order in all respects by the District Court sitting on appeal, the objecting Creditors filed a motion under Rule 60(b) of the Federal Rules of civil Procedure and the District Court by its Order entered on July 22, 1977, [sic] remanded the objecting Creditors' Rule 60(b) Motion to this Court for a hearing and determination of the issues presented.

On September 8, 1977, this Court entered an Order setting the matter for hearing at 8:00 a.m. on the 19th day of September, 1977. On September 12, 1977, the objecting Creditors filed an Application with this Court requesting that the time and date set for hearing be postponed until a date on or after October 24, 1977, for the following cited reasons: (1) Counsel for the objecting Creditors would be otherwise engaged in a jury trial before the Honorable Albert J. Henderson, Jr., District Court Judge of this District; (2) that a determination need first be made by this Court as to the adequacy or competence of the Trustee to conduct the defense, presumably in his own behalf, and as to whether Aetna Business Credit, Inc. is a proper party to this preceeding; and (3) that an order need first be entered by this Court incorporating all of the discovery documents in certain related plenary actions into these

proceedings in bankruptcy on the Creditors' Rule 60(b) Motion.

The Trustee, by his response to the Creditors' Application, has shown by the affidavits of counsel that certain criminal matters and jury trial in a civil action are set to be tried before Judge Henderson during the week of September 19, 1977, prior to the trial of the matter in which counsel for the objecting Creditors is involved. It therefore appearing that said case involving counsel for Creditors will not be reached by Judge Henderson during the time set by this Court for hearing of Creditors' Rule 60(b) Motion, Creditors' Application for continuation and postponement for the reason of the conflict anticipated by counsel for Creditors is hereby DENIED.

This Court does not perceive a logical nexus between a determination as to the Trustee's adequacy or competence to conduct his own defense, and the question of whether Aetna Business Credit, Inc. is a proper or interested party to be heard in these proceedings. It appears sufficient that Aetna Business Credit, Inc. has participated in the matter before this Court from the time of the original hearing on the Trustee's Application to settle his controversy. Further, as a party to the settlement which is the subject of this proceeding, Aetna Business Credit, Inc. would appear to have real and obvious interest in the outcome.

Accordingly, whether by right or by reason of the discretion vested in this Court to hear those who would be directly affected by its decisions, Aetna Business Credit, Inc. will not be denied a voice in this matter if it so desires. It therefor appearing that Creditors' Application for postponement for the reason that the Trustee has not been shown to be inadequate or incompetent with the result that Aetna Business Credit would be then not a party, is without merit or logic, their request for such reason is hereby DENIED.

Judge Freeman's Order of remand directed this Court to the question of whether Appellants can carry their heavy burden of demonstrating grounds for relief under Rule 60(b) (1), (2) or (3) which would warrant setting aside the earlier judgment of this Court. The cited portion of Rule 60(b) states the following reasons for providing relief from a final judgment: (1) mistake, inadvertence, surprise, or

excusable neglect; (2) newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

Since evidence supporting the grounds for relief stated under (1) and (3) of Rule 60(b) would not likely appear in the discovery documents in the related plenary actions, this Court sees no need to consider these provisions of the rule in the context of the Creditors' request for postponement based on the need for an order incorporating such discovery records into these proceedings.

The character of the evidence which must be offered in order to support a claim for relief under (2) of Rule 60(b) as stated in Professor Moore's Treaties,

> ". . . must be such as was not and could not by the exercise of due diligence have been discovered in time to present in the original proceeding. And must be admissible and credible, and must be of such a material and controlling nature as will probably change the outcome, not merely cumulative or tending to impeach or contradict a witness." 7 *Moore's Federal Practice,* Sec. 60.23[4].

It seems highly improbable to this Court that all of the discovery documents in the various related plenary actions would be admissible under the suggested criteria, or further the Creditors' effort to carry their heavy burden of demonstrating grounds for relief. It will be incumbent on the Creditors to select and offer only evidence of such a character as will meet the cited standard for "newly discovered evidence". This Court should not be put upon or required to examine or sift through a large body of discovery documents in order to determine that which might support the Creditors' contentions. This would be the case whether such purported evidence were offered *en masse,* or introduced by the Creditors in a random fashion for the purpose of determining which of such evidence might be admissible on the narrow issues before this Court.

Accordingly, since this Court views it to be the burden of the movants to produce only evidence such as would be admissible in the context of their motion, and the sum-

mary nature of the proceeding from which it stems, it perceives no reason why an order should issue incorporating quantities of discovery documents which could only tend to burden the Court and hamper an efficient and just determination of the issues.

Therefore, Creditors' Application for Postponement for the reason that an order needs to first be entered incorporating all of the discovery documents in the related plenary actions is hereby DENIED.

Counsel for Creditors suggests that the hearing on their Rule 60(b) Motion will require two to three weeks. This Court fails to comprehend how it will require such an amount of time to show this Court what the Creditors have discovered since the original hearing on May 18, 1976, which by due diligence was not discoverable before said date and which would require a different ruling with respect to the propriety of the Trustee's settlement of its controversy with Aetna Business Credit, Inc.

Creditors' request for reservation by this Court of a two to three week period for the hearing of their Rule 60(b) Motion is therefore hereby DENIED.

On Monday, September 19, 1977, the Court will confine its examination exclusively to evidence offered by the Creditors which is of a character appropriate to a Rule 60(b) Motion, and as to new evidence, that which necessarily could not have been discoverable prior to the hearing on May 18, 1976.

IT IS SO ORDERED, this 16th day of September, 1977.

/s/ WILLIAM L. NORTON, JR.
UNITED STATES BANKRUPTCY JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt

Case No. B74-1628A

[Filed January 5, 1978]

Opinion

This matter came on for hearing on September 19, 1977, upon the remanded Motion of International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Versapanel, Inc. and White Lumber Sales, Inc. (hereinafter collectively referred to as "Appellants"), which was previously filed with the United States District Court pursuant to Rule 60(b) of the Federal Rules of Civil Procedure, and upon the Application of Aetna Business Credit, Inc. (hereinafter "Aetna") for an assessment of expenses incurred by it on appeal, and upon the Application of John C. Pennington, Trustee herein of Georgia Paneling Supply, Inc., for an assessment of expenses incurred on appeal. The Court heard argument of counsel for Appellants in support of their Motion and argument of counsel for the Trustee and Aetna in opposition thereto on September 19 and 20, 1977, at the conclusion of which the Court directed Appellants to submit a brief setting forth the facts and legal principles urged in support of their Motion. The Court has reviewed the brief submitted by Appellants and the responsive brief submitted by the Trustee (which was adopted by Aetna as its response to Appellants' brief) and, based upon these briefs, the oral argument of counsel, and the record of this bankruptcy case, the Court has determined that Appellants' Motion must be DENIED for the reasons that follow.

Procedural History

The procedural history of this bankruptcy case and the circumstances out of which Appellants' instant Motion

arise is of more than passing interest and should be reviewed in order to place in proper perspective the contentions of the parties.

Georgia Paneling Supply, Inc., a Georgia corporation formed on October 19, 1972 (hereinafter "the Bankrupt") was adjudicated a bankrupt upon an involuntary petition filed by three of the Appellants on June 24, 1974, and consented to by the Bankrupt on July 29, 1974. On September 10, 1974, John C. Pennington was appointed and duly qualified as Trustee of the bankrupt estate, which was on the date of his appointment and is now without any assets.

On July 9, 1975, the Trustee filed a civil action against Aetna Business Credit, Inc. (hereinafter "Aetna") and The C & S Bank of North Fulton (hereinafter "C & S") wherein he sought to recover the amount of certain transfers to them suffered by the Bankrupt through foreclosure of their security interests upon the property of the Bankrupt.

On January 20, 1976, after having conducted discovery and investigation of the facts, the Trustee made application to this Court to settle his lawsuit with respect to Aetna pursuant to Section 27 of the Bankruptcy Act. At an in-chambers hearing held that same day, Appellants appeared in opposition to the settlement proposed and thereafter moved to intervene in the Trustee's lawsuit, which was then pending before the United States District Court.

On April 16, 1976, the Trustee renewed his application to settle with Aetna, and on May 5, 1976, Appellants filed an application to remove the Trustee for alleged dereliction of his fiduciary duties in attempting to effectuate a settlement upon terms opposed by them. In addition, Appellants filed an application requesting the Court to appoint a named successor trustee with Appellants' counsel to serve as such successor trustee's attorney.

A hearing on the Trustee's application, as well as on the two applications filed by Appellants, was held on May 18, 1976. After lengthly argument of counsel for the Trustee, Aetna and Appellants, the Court entered an order on June 17, 1976, which granted the Trustee's application and denied those filed by Appellants. From that order Appellants appealed on June 29, 1976, to the District Court, which affirmed this Court's rulings by order of April 15, 1977. On

May 16, 1977, Appellants filed a motion requesting the District Court to extend the time within which they might file a notice of appeal and on May 31, 1977, Appellants also filed the instant Motion under Rule 60(b) of the Federal Rules of Civil Procedure requesting the District Court to vacate its affirmance of this Court's June 17th order. The District Court denied Appellant's motion to extend time on June 15, 1977, and on July 22, 1977, the District Court denied Appellants' instant Motion as untimely filed.

Following the denial of their Motion under Rule 60(b), Appellants filed a second Rule 60(b) motion wherein they requested the District Court to vacate its denial of the instant Motion because the District Court had entered its order under a misapprehension of the facts relating to Appellants' timeliness. On August 26, 1977, the District Court entered an order upon Appellants' second Rule 60(b) motion vacating its denial of the instant Motion and remanding same for consideration by this Court under subparagraphs (1), (2) and (3) of Rule 60(b).

On September 8, 1977, this Court entered an order directing Appellants, Aetna and the Trustee to appear before the Court on September 19, 1977, for a hearing upon Appellants' remanded Motion. Appellants on September 13, 1977, filed with the Court an application requesting a continuance of the scheduled hearing; urging the Court to prohibit counsel for Aetna from participating at the hearing; requesting the Court to have all discovery taken in the pending action before the District Court incorporated by reference for use at the hearing; and asking the Court to set aside two weeks of its calendar to devote to the hearing on their Motion. On September 16, 1977, this Court entered an order denying in all respects this application of Appellants.

At the outset of the scheduled hearing on their Motion, Appellants informed the Court that they had or were planning to file a notice of appeal from the Court's denial on September 16, 1977, of their pre-hearing application; moved the Court for a stay of the hearing pending a disposition of the appeal; and requested the Court to reassign their Motion to another Bankruptcy Judge whose calendar would permit the devotion of two weeks to the

hearing. The Court likewise denied these requests of Appellants.

Thereafter, the hearing proceeded and the Court permitted Appellants to present evidence in support of their Motion. In view of Appellants' contention that the hearing would require two full weeks, which the Court found somewhat incredible, and in an effort to focus the hearing upon the grounds for relief asserted in the Motion rather than allowing the hearing to evolve into a full-blown trial on the merits, the Court requested Appellants' counsel to summarize their asserted grounds for relief and the nature of the evidence that Appellants intended to repesent in support thereof prior to their examination at length of witnesses. The Court's primary purpose in making this request was to determine whether, taking as true the evidence that Appellants intended to present, Appellants would as a matter of law be entitled to relief under any one or more of subparagraphs (1), (2) or (3) of Rule 60(b) of the Federal Rules. Appellants' counsel strenuously objected to this request of the Court and maintained that they should be permitted to present all of their evidence without first having to explain how such evidence might be relevant to their Motion. Before complying with the Court's request, Appellants' counsel moved the Court to exclude the Trustee and his attorney from the courtroom during his explanation of Appellants' contentions and the nature of their evidence. The Trustee voluntarily agreed to absent himself from the courtroom and the Court ruled that the Trustee's counsel was entitled to remain. After approximately four hours, during which Appellants' counsel summarized in part the nature of Appellants' contentions and argued the relevance of the evidence which they proposed to offer in support of their Motion, the hearing was adjourned to the following morning, at which time it resumed and continued for a period of several more hours.

As a result of the Court's failure to discern the factual contentions urged by Appellants in support of their Motion and the relevance of much of the evidence that they proposed to offer, stemming largely from the refusal of Appellants' counsel to explain same, the Court directed counsel for Appellants to submit a legal brief detailing what they expected to elicit from their witnesses and what

they expected their documentary evidence to show (attaching such documents to their brief) in order that the Court could determine whether Appellants would be entitled to any relief under Rule 60(b) even assuming the truth of their evidence. The Court made clear to all parties that, in the event there were any disputes as to any material fact set forth in Appellants' brief or in any brief filed in response thereto, a hearing would be held solely for the purposes of receiving evidence as to those disputed facts.

Summary of Undisputed Facts

The following is a summary of those facts, which for the purpose of this Motion have not been disputed by the parties either in their briefs or at the hearing:

(1) Prior to its adjudication, the Bankrupt was engaged in the wholesale lumber business at Mimms Drive, Gwinnett County, Georgia, and was owned and managed by T. R. Locke, J. Wayne French and other persons whose identities are unimportant for the purpose of the instant Motion.

(2) In addition to their ownership interest in and management of the Bankrupt, Messrs. Locke and French had an ownership interest in and managed the operations of several other companies (hereinafter collectively referred to as "the Georgia Paneling group") known as Georgia Paneling Company, Inc. (hereinafter referred to as "Paneling"), Georgia Paneling Company of Doraville, Inc. and Georgia Paneling Company of Forest Park, Inc. (hereinafter referred to as "Forest Park"). The Georgia Paneling group operated essentially as retail outlet stores on behalf of the Bankrupt, which consigned to them for retail sale inventory consisting of lumber and related products purchased by the Bankrupt from its supplier. All accounts receivable generated by the Georgia Paneling group were owned by and turned over to the Bankrupt, which would remit a certain percentage of the proceeds back to the Georgia Paneling group in order to maintain their retail sales operations.

(3) Appellants were suppliers of the Bankrupt and are now unsecured creditors of the Bankrupt.

(4) On June 22, 1973, Aetna completed an internally prepared document styled "Loan Application Approval" in

connection with an accounts receivable financing arrangement that it was contemplating with Paneling, which then was operating out of a warehouse at 122 Oak Street in Roswell, Georgia.

(5) Both the Bankrupt and Paneling executed the following loan documents, each of which are dated June 25, 1973, and delivered same to Aetna: General Loan and Security Agreement; Security Agreement-Accounts and Accounts Receivable; Promissory Note to Aetna for $250,000.00; Continuing Guaranty by the Bankrupt of all indebtedness of Paneling to Aetna; Continuing Guaranty by Paneling of all indebtedness of the Bankrupt to Aetna; and UCC Form-1 Financing Statements.

(6) The Trustee has demonstrated, and Appellants have not disputed, that on October 16, 1973, Aetna completed an internally prepared document styled "Loan Application Approval" in connection with an increase in the loan limit of its accounts receivable financing arrangement with the Bankrupt.

(7) The Bankrupt executed the following loan documents, each of which are dated October 22, 1973, and delivered same to Aetna: Amendment to Security Agreement and Promissory Note to Aetna for $450,000.00.

(8) The Bankrupt executed the following loan documents, each of which are dated January 7, 1974, and delivered same to Aetna: General Loan and Security Agreement; Security Agreement-Accounts and Accounts Receivable; Promissory Note to Aetna for $450,000.00; and UCC Form-1 Financing Statement.

(9) Pursuant to the various loan documents referred to above, both the Bankrupt and Paneling granted to Aetna a security interest in, among other things, all of their then existing and after-acquired inventory, accounts receivable, contract rights, general intangibles and the proceeds of the foregoing.

(10) In December of 1973, Appellants contend, and the Trustee apparently does not dispute, that a fire destroyed all or substantially all of the contents of the warehouse of Forest Park. The contents of the warehouse apparently were insured against fire loss and the Bankrupt was or claimed to be the loss payee on the policy of insurance. Appellants contend that the Bankrupt received the insur-

ance proceeds from the fire loss and that these proceeds were ultimately paid to Aetna.

(11) The Trustee contends, and Appellants have not disputed, that pursuant to the loan documents previously described, Aetna made wire transfers of funds during 1974 to the Bankrupt's checking account at C & S. There is no evidence that Aetna ever wired any sums of money to Paneling.

(12) Beginning sometime in June of 1974, Aetna took possession of the inventory of the Bankrupt without a breach of the peace and foreclosed its security interest thereon by reason of certain defaults alleged by Aetna to have occurred.

Issue Presented

The ultimate issue in this case is whether Appellants are entitled to any relief under Rule 60b of the Federal Rules of Civil Procedure.

Appellants in their Motion contend that "upon discovery of Aetna Business Credit, Inc., in a related plenary action" they have evidence showing that "Aetna received a preference voidable under Section 60b of the Bankruptcy Act from" the Bankrupt and that Aetna "broke its obligation of good faith" and "acted in a commercially unreasonable manner as to" the Bankrupt. Thus, they contend that they are entitled as unsecured creditors of the Bankrupt to relief from the Court's order of June 17, 1976, which approved over their opposition the settlement between the Trustee and Aetna, pursuant to the following subparagraphs of Rule 60(b) of the Federal Rules of Civil Procedure:

(1) Subparagraph (1) of Rule 60(b), which authorizes the Court to grant relief from an order for "mistake, inadvertence, surprise, or excusable neglect";

(2) Subparagraph (2) of Rule 60(b), which authorizes the Court to give relief from an order on the grounds of "newly discovered evidence"; and

(3) Subparagraph (3) of Rule 60(b), which empowers the Court to afford relief from an order obtained by "fraud misrepresentation or other conduct[sic] of an adverse party."

Before examining the facts that Appellants urge in support of their Motion, it is appropriate first to review the principles of law which are applicable to a motion under Rule 60(b).

Applicable Law

The Trustee's Brief fairly summarizes the law applicable to a Rule 60(b) motion. As the Trustee correctly observes, the August 26th order of the District Court remanded to this Court for determination whether Appellants "can carry their heavy burden of demonstrating grounds for relief under Rule 60(b) (1), (2) or (3) which would warrant setting aside" this Court's June 17th order approving the Trustee's settlement. An analysis of the provisions of these subparagraphs of Rule 60(b) is therefore appropriate at this juncture.

Rule 60(b) provides in pertinent part as follows:

> "On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other conduct[sic] of an adverse party . . . The motion shall be made within a resonable period of time, and for reasons (1), (2) and (3) not more than one year after the judgment, order or proceeding was entered or taken."

The courts are in agreement that a motion for relief under Rule 60(b) is addressed to the sound discretion of the court. *See Hand v. U. S.*, 441 F.2d 529 (5th Cir. 1971). In exercising such discretion, the Court must balance the policy of the law to prevent injustice against the equally strong policy in favor of achieving finality in litigation. *See In Re Casco Chemical Co.* 335 F2d 645, 651 (5th Cir. 1964). Some factors which must be weighed in the balance are whether the motion has been made within a "reason-

able time", even though the stated time limit has not expired; whether the movant can show good reason for his failure to take appropriate action sooner; whether the movant can show a good claim or defense; and whether undue prejudice or hardship would result to other parties if the motion were granted. *See generally* 11 Wright and Miller, *Federal Practice and Procedure*, Section 2857, at 160-61 (1973).

Subparagraph (1) of Rule 60(b) authorizes the Court to give relief from an order for "mistake, inadvertence, surprise, or excusable neglect." The authority granted by this subparagraph has been exercised in a variety of circumstances, such as when a party not represented by counsel makes a procedural error, *see Woods v. Severson*, 9 F.R.D. 84 (D.Neb. 1949); when a party failed to appear at trial for good reason, *see Denman v. Shubrow*, 413 F.2d 258 (1st Cir. 1969); when an answer was not filed until one day after the expiration of an extended time for service and filing, *see Davis v. Parkhill-Goodloe Co.*, 302 F.2d 489 (5th Cir. 1962); and when a consent order is entered into based upon erroneous factual respresentations made by the other party, *see U.S. v. Gould*, 301 F.2d 343 (5th Cir. 1962). However, relief generally has not been granted solely on the grounds of ignorance of the law, *see U.S. v. Erdoss*, 440 F.2d 1221 (2nd Cir.1971), *cert. denied*, 404 U.S. 849; carelessness of a litigant or his attorney, *see Cline vs. Hoogland*, 518 F.2d 776 (8th Cir. 1975); failure to present all of the facts known to the movant that might have been useful to the court in rendering a decision, *see Smith v. Stone*, 308 F.2d 15 (9th Cir. 1962); or ineffective tactical decisions of counsel, *see U.S. v. 1,550.44 Acres of Land*, 369 F. Supp. 1078 (D.N.D. 1974).

Subparagraph (2) of Rule 60(b) empowers the Court to give relief from an order on the grounds of newly discovered evidence. The evidence must have been in existence at the time of the trial or hearing, *see Ryan v. U.S. Lines Co.*, 303 F.2d 430 (2d Cir. 1962); it must be "newly discovered" in the sense that it was not in the possession of the movant before the order was entered, *see Kolstad v. U.S.*, 262 F.2d 839 (9th Cir. 1959); it must have been evidence

that "by due diligence" could not have been discovered prior to the hearing or in time to move for a new trial or for reconsideration, *see Flett v. W.A. Alexander & Co.*, 302 F.2d 321 (7th Cir. 1962), *cert denied* 371 U.S. 841; it must be evidence that is not merely cumulative and must be of such materiality and weight as to probably produce a difference[sic] outcome in the proceedings, *see Trans Mississippi Corp. v. U.S.*, 494 F.2d 770 (5th Cir. 1974).

Subparagraph (3) of Rule 60(b) authorizes the Court to grant relief from an order obtained by fraud, misrepresentation or other misconduct of an adverse party. The burden is upon the movant to establish the fraud by clear and convincing evidence. *See Saenz v. Kenedy*, 178 F.2d 417 (5th Cir. 1950); *Wilkin v. Sunbeam Corp.*, 466 F.2d 714 (10th Cir. 1972). As a general rule, a statement of opinion as to the law, whether or not accurate, would not constitute fraud or other misconduct within the meaning of subparagraph (3). *See Walker v. Bank of America National Trust & Savings Association*, 268 F.2d 16 (9th Cir. 1959).

A motion made under any or all of the above-discussed subparagraphs of Rule 60(b) must be made within a reasonable time after entry of the order from which relief is sought and in no event later than one year after the order was entered. If a motion for relief under any of these subparagraphs is not made within a reasonable time, it will be denied, although made within the one-year maximum period. *See Standard Newspapers, Inc. v. King*, 375 F.2d 115 (7th Cir. 1967); 7 Moore, *Federal Practice*, Sec. 60.28[2] (2d ed. 175). What constitutes reasonable time must of necessity depend upon the facts in each case. However, the Court should consider whether the party opposing the motion has been prejudiced by the delay in seeking relief and whether the movant has some good reason for his failure to take appropriate action sooner. *See generally* 11 Wright and Miller, *supra*, Sec. 2866 at pp. 228-31.

Having thus reviewed the general principles governing relief under Rule 60(b) (1), (2) and (3), it is now incumbent upon the Court to analyze each of Appellants' asserted grounds for relief in the context of these principles.

Summary of Appellants' Contentions

Appellants have filed four amendments to their original Rule 60(b) Motion, each of which amendments attempts to supplement and enlarge the grounds alleged for relief.

In their original Motion, Appellants argue that their motion should be granted on the basis of newly discovered evidence indicating that (1) Aetna never made a "loan" to the Bankrupt (and presumably, therefore, foreclosed upon the wrong company;* (2) that the person signing the loan documents on behalf of Aetna did not have the requisite corporate authority to sign; (3) that Aetna allegedly collected excessive amounts of interest from Paneling, the company to which Aetna actually made the loan according to Appellants; (4) that J. Wayne French did not have proper authority to surrender the premises to Aetna on June 7, 1974, the date on which Aetna took possession of the inventory of the Bankrupt prior to actual foreclosure; (5) the Bankrupt as guarantor of the indebtedness of Paneling was discharged by reason of a novation and an accord and satisfaction; (6) that Aetna wrongfully seized the insurance proceeds which resulted from a fire of the Forest Park warehouse and which were payable to the Bankrupt; (7) that Aetna's loan documents were unconscionable on their face; (8) that Aetna took possession of the Bankrupt's inventory on June 7, 1974, without Mr. French's consent and by duress or coercion; (9) that the Bankrupt's guaranty of the Paneling indebtedness was an unsecured guaranty and therefore Aetna could not enforce that guaranty *in rem* by foreclosing upon the assets of the Bankrupt; (10) that the loan documents executed in January of 1974 were without consideration and therefore unenforceable; and (11) that Aetna foreclosed upon the property of the Bankrupt in a commercially unreasonable manner.

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*Appellants' use of the term "loan" is slightly misleading. It appears that Aetna never made one lump sum advance to either the Bankrupt or Paneling, but rather advanced against accounts receivable pledged to it from time to time under an accounts receivable financing arrangement.

In their first amendment to their original 60(b) Motion, Appellants attach an affidavit of a person who presumably analyzed all invoices in the possession of the Trustee and determined that eighty percent of those invoices bear the letterhead of Paneling while only twenty percent bear the name of the Bankrupt. This affidavit is offered to supplement Appellants' contention that the loan from Aetna was made to Paneling and not to the Bankrupt.

Appellants' second amendment to their Motion consists of an Affidavit from their counsel and is offered to demonstrate excusable neglect, newly discovered evidence, misrepresentation or misconduct of an adverse party and "any other reason justifying relief" from the operation of this Court's approval of the Trustee's settlement.

Appellants' third amendment to their Motion consists solely of a photocopy of their original Motion with handwritten notations interspersed throughout which give citations to various depositions.

Appellants' fourth amendment to their Motion contains two affidavits, the first from an employee of one of the Appellants and the second from Appellants' counsel, which are offered to demonstrate their "mistake, surprise and inadvertence".

Appellants also filed in support of their original Motion a document styled "Motion for Leave to Submit Affidavits of Persons Present Under Subpoena for Hearing before the Honorable Richard C. Freeman on July 19, 1977", which by order dated July 22, 1977, the District Court denied. Although these affidavits are not properly before this Court on remand, the Court will nevertheless consider them.

Finally, Appellants have filed with this Court a brief which advances three grounds in support of their Motion: First, on the ground of newly discovered evidence showing that Aetna made a loan to Paneling and not to the Bankrupt; secondly, on the grounds that Appellants were mistaken as to the true identity of the party to whom the loan from Aetna was made; and thirdly, on the ground that Aetna committed a fraud in representing to this Court at the May 18th settlement hearing that the loan was made to the Bankrupt when, in fact, it was made to Paneling as they contend. It appears from Appellants' brief that Appel-

lants have abandoned the majority of their numerous theories and place almost total reliance upon their contention that Aetna made only one loan and that that loan was made to Paneling rather than to Aetna[sic].

Conclusions of Law

A. **Rule 60(b)(1)** — Mistake, Inadvertence, Surprise or Excusable Neglect.

In support of their claim for relief under subparagraph (1) of Rule 60(b), Appellants first offer the affidavit of their counsel, which in essence consists of a 32-paragraph overview of the history of this litigation and his participation therein. The affidavit is attached to Appellants' Second Amendment to their Motion and is offered in part to demonstrate "excusable neglect". The Court understands the term "excusable neglect" as used in Rule 60(b) (1) to mean neglect prior to the entry of the order from which relief is sought. The Court is unable to find in this affidavit of Appellants' counsel, which is largely self-serving, any reference to neglect prior to the June 17th order, and the Court is unable to infer any neglect from the narration of facts contained in the affidavit. Accordingly, the Court concludes that this affidavit does not satisfy the requirements for relief under Rule 60(b)(1).

Appellants also offer in support of their claim for relief under Rule 60(b)(1) the two affidavits attached to their Fourth Amendment to the instant Motion. The first of these affidavits is that of Billie Fred Sponsler, an agent of one of the Appellants, and the second is an affidavit of Appellants' counsel.* Mr. Sponsler's affidavit consists of a fifteen paragraph narration of his mistake in believing that Aetna had made a loan to the Bankrupt; his surprise in learning the alleged facts which Appellants now claim constitutes newly discovered evidence; and his inadvertence in failing to instruct his attorney to examine certain of the loan documents between Aetna and the Bankrupt. The Court finds Mr. Sponsler's affidavit to be largely

*None of the Appellants besides International Paper Company (of which Mr. Sponsler is an agent) submitted any affidavits to demonstrate their surprise, inadvertence or excusable neglect.

conclusory and essentially self-serving. The mistake to which Mr. Sponsler alludes is not the type of mistake contemplated by Rule 60(b)(1). Moreover, Mr. Sponsler has given no reason in his affidavit to justify his failure to avoid such a mistake. If in fact the loan was made to Paneling rather than the Bankrupt and Appellants were unaware of this fact, then a claim for relief based upon newly discovered evidence *might* be possibly stated, but not a claim for relief under Rule 60(b)(1). The same holds true for Mr. Sponsler's alleged surprise. If the facts which he was surprised to learn after the hearing constitute newly discovered evidence, then subparagraph (2) rather than subparagraph (1) of Rule 60(b) would be the appropriate grounds for granting the relief. Finally, with regard to Mr. Sponsler's alleged inadvertence, the Court finds that the inadvertence of a client in not instructing his attorney to perform the very legal services for which the attorney was retained does not amount to "inadvertence" under Rule 60(b)(1). The Court does not understand Mr. Sponsler's affidavit to mean that his counsel was negligent and that Appellants therefore should be relieved from the effect of such negligence. Mr. Sponsler simply states that he was inadvertent in not telling his attorney what to do. This is not enough to justify relief under Rule 60(b)(1).

The second affidavit attached to this Fourth Admendment, which is the affidavit of Appellants' counsel, recites events that occurred *after* the June 17th order and therefore completely fails to demonstrate any mistake, surprise, inadvertence or excusable neglect which would justify relief under Rule 60(b)(1).

Finally, Appellants contend in the brief filed herein that the Court made a mistake by basing its June 17th order upon the erroneous assumption that Aetna made a loan to the Bankrupt. Appellants argue at one and the same time that no loan was made to the Bankrupt and that the Court erred "in assuming that there was no doubt as to the identity of the borrower." *See* Appellants' Brief at pp. 12 and 14. As to Appellants' latter argument, it is inconceivable how this Court could have erred in thinking that there was no doubt in view of the fact that the Bankrupt, its attorney, its officers, the Trustee and everyone concerned advised the Court that the Bankrupt was the prin-

cipal obligor to Aetna. As to the former argument, the Court concludes for the reasons stated hereinafter that Appellants have offered no evidence that demonstrates a loan made by Aetna to any person or entity other than the Bankrupt.

The Court concludes, therefore, that Appellants have not offered any facts (or even assertions of fact) that would justify the granting of their Motion under subparagraph (1) of Rule 60(b).

B. **Rule 60(b)(3)** — Fraud, Mispresentation or other Misconduct of an Adverse Party.

In support of their claim for relief under Rule 60(b)(3), Appellants maintain that Aetna through its attorney misrepresented to the Court at the May 18th hearing that Aetna made a loan to the Bankrupt. Appellants argue that this representation was false and imply that it was made with knowledge of the falsity of the statement. It is an extremely serious matter to charge another party or its counsel of having committed a fraud upon the Court, and, absent a strong showing to the contrary, the Court must presume that the parties and their counsel have dealt with each other and with the Court honestly and in good faith. The burden of proving fraud is upon Appellants and such fraud must be shown by clear and convincing evidence. Appellants have utterly failed to carry this burden. All they have shown is that Aetna's counsel made the representation in question at the May 18th hearing. Even assuming *arguendo* that the representation was inaccurate, Appellants have offered nothing to indicate that Aetna's counsel knew or even suspected that the representation was untrue. Furthermore, it should be emphasized that from time to time during the course of this bankruptcy case the Bankrupt, its officers and attorney, and the Trustee have made the same representation as that made by Aetna's counsel respecting the loan from Aetna. *See* Appellant's brief at page 11. Appellants stand alone in their contention that no such loan was made by Aetna to the Bankrupt and the evidence which they offer in support of this contention is far from convincing.

Appellants also charge that Aetna was guilty of misconduct in connection with discovery taken in the Trustee's

lawsuit after the June 17th order of this Court. Even assuming that such misconduct occurred (which the Court has no reason to believe), Appellants have not demonstrated why this would justify granting the relief requested in their Motion.

For the foregoing reasons, the Court concludes that Appellants have failed to suggest any basis for relief under Rule 60(b)(3).

C. **Rule 60(b)(2)** — Newly Discovered Evidence.

Before proceeding with an examination of Appellants' claim for relief under subparagraph (2) of Rule 60(b), the Court will first address a number of contentions made by Appellants in their original Motion, which they presumably offer in support of their claim for relief under subparagraph (2), but which this Court finds to be altogether without merit.

First, Appellants refer throughout their Motion and brief to Aetna's alleged bad faith in its dealings with the Georgia Paneling group. The Court has been unable to discern any specific instances of alleged bad faith as Appellants' assertions in this regard have been merely conclusory. In any event, the Court notes that the provisions of Section 109A-1—203 of the Georgia Code, which states that an obligation of "good faith" inheres in the performance or enforcement of every contract and to which Appellants presumably refer, is directive rather than remedial. The Court has been unable to find any jurisdiction that allows recovery of damages under this general provision of the Georgia Uniform Commercial Code. *Accord Chander v. Hunter,* 304 So.2d 818 (Ala. 1976).

Secondly, Appellants contend that Aetna overcollected interest from Paneling. Appellants presumably have abandoned this claim since they have made no offer of proof of this fact other than their counsel's affidavit that an accountant was retained to verify this fact. The Court assumes that Appellants were contending that this alleged overcharge operated to discharge the Bankrupt from its guaranty of Paneling's debt to Aetna. Appellants have offered no proof of an overcharge and indeed have failed to point to one fact supporting their assertion that Aetna collected any interest from Paneling whatsoever.

Thirdly, Appellants argue that the Bankrupt was discharged from its guaranty as a result of an agreement between Paneling and Aetna to extend the time of payment of the Paneling debt, which Appellants argue amounted to a novation and an accord and satisfaction, and by reason of the alleged bad faith of Aetna. No effort has been made by Appellants to substantiate such claims and there is nothing in the record, other than Appellants' conclusory statements, from which to infer that these claims have any factual basis. In any event, Appellants' success on these theories likewise hinges upon a finding that the Bankrupt was liable to Aetna only as a guarantor and not as a principal obligor. The Court finds these unsupported assertions of Appellants totally unsatisfactory for purposes of relief under Rule 60(b)(2). Moreover, the Court takes this opportunity to observe that, while a novation discharges a surety when made without the surety's consent, as argued by Appellants, the Bankrupt in the instant case was a guarantor and not a surety. Even assuming that the Bankrupt was a surety, the Bankrupt consented in the Continuing Guaranty signed by it to any extension of time granted by Aetna for the payment by Paneling of any indebtedness owed to Aetna and to any compromise or settlement of any such indebtedness to Aetna. Furthermore, even assuming that Paneling rather than the Bankrupt was the principal obligor to Aetna, and further assuming that Paneling and Aetna entered into an accord as argued by Appellants, there is no evidence that the accord was likewise meant to constitute a satisfaction until the indebtedness was paid in full. *See J. A. Construction Co. v. Greenbriar Shopping Center,* 332 F.Supp. 1336 (N.D. Ga.), *aff'd* 461 F.2d 1269 (5th Cir. 1971) (a mere accord is dependent upon complete performance before it operates in satisfaction of original agreement).

Fourthly, Appellants maintain that the various loan documents executed by Paneling and the Bankrupt are unenforceable because they are unconscionable on their face and were executed on behalf of Aetna by an offical without the requisite corporate authority to bind Aetna to the agreements. With respect to Appellants' arguments about the alleged unconscionable nature of the loan documents, which they argue should be nullified under section

109A-2—302 of the Georgia Code dealing with unconscionability, Appellants have simply noted that the documents authorized Aetna to make advances in its discretion and required the Bankrupt to pledge its accounts receivable to Aetna for so long as the agreements remained in force and the Bankrupt was indebted to Aetna. Initially, the Court would point out that section 109A-2-302 does not by its terms apply to transactions not involving a sale, such as in the instant case. *See Interstate Security Police, Inc. v. Southern Emory Bank,* 237 Ga. 37 (1976). In any event, the Court finds nothing unconscionable about such an arrangement, which is the essence of accounts receivable financing. The Court must assume that the Bankrupt and Paneling entered into such agreements voluntarily, there being no argument or evidence to the contrary. Further, the Court notes that the agreements provide for termination at will by either party. Even assuming that the loan documents were found to be unconscionable in whole or in part, Appellants have failed to suggest how the Bankrupt was injured thereby and have omitted any citations of authority for the proposition that Aetna would thereby be required to forfeit either the debt owed to it or its perfected security interest in the inventory of the Bankrupt. From a review of such loan documents, the Court is of the opinion that the outcome of the settlement hearing on May 18th would not have been altered had Appellants, who at that time were aware of the contents of such loan documents and had examined same, argued that the loan documents were unconscionable. With respect to Appellants' assertion that the loan documents are unenforceable because not signed by an officer of Aetna with the necessary corporate authority to bind Aetna to the agreements, the Court finds such an assertion to be wholly without merit and bordering on being frivolous. Appellants do not contend that the person signing on Aetna's behalf did *not* have the necessary authority, but rather state that they are unaware of any fact suggesting that he did have such authority. Without speculating whether such authority existed, the Court is of the opinion that lack of corporate authority on the part of an Aetna employee could not be raised in an action by the Trustee against Aetna to vitiate the very agreements which Aetna from the inception of

this litigation has relied upon as its defense. Even assuming lack of proper corporate authorization, it is apparent that Aetna has ratified the act of its agent who executed the documents and has never once maintained that it should be relieved from the effect of the agreements. *See* Ga. Code Ann. Sec. 4-303; *Advance Mortgage Corp. v. Guaranty Title Ins. Co.,* 416 F.2d 451 (5th Cir. 1969); *Greene v. Golucke,* 202 Ga. 494 (1947).

Fifthly, Appellants have argued in their Motion that J. Wayne French, an officer of the Bankrupt, did not have the necessary corporate approval to surrender possession of the Bankrupt's inventory to Aetna in June of 1974 and that Aetna took possession of the inventory without Mr. French's consent and by duress or coercion. Although the Court finds these two assertions to be patently inconsistent — that Mr. French, on the one hand, consented without proper authority and that, on the other hand, he did not consent at all — the Court feels that such assertions are without merit in any event. Under Georgia law a secured party has the right to take possession of his collateral upon default without judicial process if this can be done without a breach of the peace. *Ga. Code Ann.* Sec. 109A-9–503. Georgia law, therefore, does not require the debtor's consent to such action. *See also Thompson v. Ford Motor Credit Co.,* 550 F.2d 256 (5th Cir. 1977). Accordingly, it is irrelevant whether Mr. French was "authorized" to surrender the inventory to Aetna. Indeed, contrary to Appellants' assertions, it appears that the loan documents expressly authorized Aetna to take possession of its collateral upon default and that these loan documents were approved by a resolution of the Board of Directors of the Bankrupt. *See* Exhibit "A" to Trustee's Brief. With regard to Appellants' alternative theory that Aetna took possession of the inventory without Mr. French's consent and by duress or coersion, the Court first notes that, for the reaons previously discussed, Mr. French's consent was not necessary. Appellants have offered no evidence that Aetna took possession of its collateral by any duress or coercion. On the contrary, one of Appellants' witnesses testified at the hearing on their Motion that a single Aetna representative appeared at the premises of the Bankrupt on June 7, 1974, to effect the takeover and that a number of the

Bankrupt's employees were present. It can hardly be presumed that an agent of Aetna single-handedly took control of the Bankrupt away from Mr. French and several of the Bankrupt's employees by force or against their will. Finally, even assuming that Aetna used coercion to take possession of its collateral, Appellants have not shown how this fact alone injured the Bankrupt, nor how it should alter the outcome of the May 18th settlement hearing.

Sixthly, Appellants argue that the Bankrupt's guaranty of all indebtedness of Paneling to Aetna was not secured because on the second page of the guaranty the words "This guaranty is secured by" precede a blank space that has not been completed by the parties. Therefore, argue Appellants, Aetna could not foreclose upon the property of the Bankrupt by reason of Paneling's default under the loan documents. This argument also is based upon the assumption that the Bankrupt was not indebted to Aetna independently of its guaranty and is totally without merit if, as the Trustee contends, Aetna made advances of money to the Bankrupt pursuant to the accounts receivable financing arrangement. Without addressing the question whether Appellants would be entitled to any relief even assuming that the Bankrupt was not the recipient of advances from Aetna, the Court feels compelled first to examine the dispositive issue, to-wit: whether Paneling, rather the Bankrupt, was the sole recipient of disbursements from Aetna, which examination will be taken hereinbelow.

Seventhly, Appellants allege that the loan documents executed in January, 1974, which create security interests in favor of Aetna in the property of the Bankrupt, are unenforceable because they were without consideration. Apparently, Appellants' argument is that, if the loan documents do not constitute a binding agreement because they are without consideration, then Aetna's security interest is unenforceable. Under Georgia law, however, all that is necessary for the creation of an enforceable security interest is an agreement that it attach to collateral, the giving of value and the acquistion by the debtor of rights in the collateral. *Ga. Code Ann.* Sec. 109A-9—204(1). There does not seem to be any dispute that the loan documents consti-

tute an agreement that a security interest attach. Nor does there appear to be any dispute that the Bankrupt acquired rights in the inventory collateral. Thus, the only remaining question is whether value was given. A person gives "value" for rights under Georgia law if he acquires those rights "as security for or in total or partial satisfaction of a pre-existing claim." *Ga. Code Ann.* Sec. 109A-1—201(44). If at the time these loan documents were executed or afterwards the Bankrupt was indebted to Aetna, then Aetna acquired the rights granted to it under the loan documents for value. Whether the Bankrupt was indebted to Aetna in January of 1974 at the time that these loan documents were executed or thereafter will hinge upon the discussion below concerning whether Aetna made the loan to Paneling, as Appellants contend, or to the Bankrupt, as the Trustee contends.

Finally, Appellants argue that Aetna did not foreclose upon the Bankrupt in a commercially reasonable manner. Other than the naked and argumentative assertions embodied in their Motion, Appellants have offered no evidence to indicate any commercial unreasonableness on Aetna's part in foreclosing upon the property of the Bankrupt. Apparently, the alleged commercial unreasonableness to which Appellants refer is Aetna's alleged seizure of lumber owned by them or in which they had an interest. As the Court noted in its June 17th order, such facts might if true support their claim for relief in their intervention action against Aetna, but would not constitute grounds for relief by the Trustee.

Turning to Appellants' claim for relief under subparagraph (2) of Rule 60(b), Appellants maintain that they have "newly discovered evidence" which would presumbly satisfy the conditions for qualification as such. Appellants contend that their newly discovered evidence indicates that only one loan was made to the Georgia Paneling group and that the one loan was made to Paneling rather than to the Bankrupt. Appellants further contend that Aetna converted property of the Bankrupt when it obtained the insurance proceeds paid on account of the fire loss at the Forest Park warehouse. They go on to argue that Aetna's alleged refusal to return the portion of such proceeds attributable to the destruction of equipment in

which Ann Roberts, an employee of "Forest Park", had an interest,* discharged the Bankrupt as a guarantor of the indebtedness to Aetna. Appellants assert these latter instances of newly discovered evidence under the heading of "summary of facts", without citing authority for the conclusions of law derived therefrom other than reference to Appellants' deductions as to Aetna's "bad faith".

To prove their contention that Aenta made no loan to the Bankrupt, Appellants would necessarily have to overcome the clear meaning of the language contained in the various loan agreements between Aetna and the Bankrupt. They would apparently claim to have newly discovered parol or other evidence which would clearly prove a course of conduct inconsistent with such language. The documentary evidence and the record reflecting the conduct of the parties simply does not support such a finding or conclusion. The clear language of the loan documents executed by the Bankrupt and the Georgia Paneling group evidenced the fact that Aetna entered into an accounts receivable financing arrangement. As Appellants admit, most if not all of such documents, including notes, security agreements, guaranty agreements and cross collateralization agreements, *were* available to Appellants and inspected by their counsel at least as early as October 6, 1975, being seven months prior to the May 18th hearing on the Trustee's settlement application.

Of greater significance, the uncontroverted evidence in the record reflects that Aetna made wire transfer advances directly to the Bankrupt's checking account with C & S against receivables pledged to Aetna by the Bankrupt. Readily available records demonstrate that Aetna made such advances directly to the Bankrupt in the amount of at least $519,000.00 during the period of November 30, 1973, through April 11, 1974. *(Compare* highlighted cash advances appearing on Aetna's MTD Transaction Summaries [Trustee's Exhibit "B"] *with* highlighted deposit entries shown on the Bankrupt's checking account statements

*Appellants themselves seem to be confused about who had the interest. In their Brief, they indicate that Ann Roberts held the interest while in their Motion they say Leonard Roberts had the interest.

from C & S [Trustee's Exhibit "C"]). Moreover, Appellants themselves observe that the Bankrupt forwarded to Aetna checks received from the Bankrupt's account debtors in the approximate amount of $263,657.96. *See* Affidavit of W. Kent Bishop, attached to Appellants' Brief, at paragraph 70. There is no evidence that Paneling made any payments to Aetna. The fact of an agreement to advance money to the Bankrupt, together with the fact that substantial advances were actually made to the Bankrupt and payments made to Aetna by the Bankrupt, convincingly demonstrate that the Bankrupt was indebted to Aetna pursuant to the loan agreements.

While the loan agreement, which speaks for itself, and the foregoing analysis of the money had and received by the Bankrupt should clearly dispose of Appellants' contention that Aetna never made a loan to the Bankrupt, Appellants point to the following in their attempt to rebut the clear and convincing evidence of a loan from Aetna to the Bankrupt: a Loan Application Approval form, being an internal document prepared by Aetna to assist in determining the feasibility of an accounts receivable financing arrangement, which indicates Aetna's initial contemplation that Paneling was to be the borrower; the testimony of an officer of Aetna to the effect that only "one loan" was made to the Bankrupt and the Georgia Paneling group; an analysis of invoices, being those presumably pledged to Aetna, which reveals that eighty percent bore Paneling's name and only twenty percent that of the Bankrupt; and the fact that Aetna's internal records of the amount of daily pledges, advances and receipts, which are embodied in a document called an "MTD Transaction Summary" (See examples in Trustee's Exhibit "B") show that the loan was carried in Paneling's name.

When viewed in context and with the other evidence available in the record, the support Appellants would offer for their contentions is not sufficient to carry their burden of proof, whether such were to be characterized as newly disovered or otherwise. The Court agrees with the Trustee that the loan application approval form cannot be used to demonstrate that no loan existed between Aetna and the Bankrupt as it has no probative value for the purpose of rebutting the uncontradicted evidence that funds were in

fact advanced by Aetna to the Bankrupt. Indeed, it is apparent from the testimony of T. R. Locke, the President of the Bankrupt and of Paneling, that about the same time that Aenta was preparing the cited loan application approval, Paneling was transferring assets from its Oak Street location to the then recently opened warehouse of the Bankrupt. (*See* Vol. I, Locke Disposition, 5/10/77, pp.8-11, Trustee's Exhibit "D") The record reflects Aetna's awareness and concern regarding such intercompany transfer of assets as well as its resulting decision to document the loan in the name of the Bankrupt as well. (*See* Trustee's Exhibit "E", correspondence from Aetna concerning the loan documents, dated 6/25/73, addressed to Paneling, and *the*[sic] *7/2/73, addressed to the Bankrupt.)*

Moreover, a subsequent Loan Application Approval form dated October 16, 1973, which the Appellants do not cite, bears only the name of the Bankrupt as the applicant. Further, on this later application, Paneling is shown only as a guarantor and referred to as a "sales agent" and "shell corporation". (*See* Trustee's Exhibit "E"). A further indication of the true identity of the borrower is the fact that the loan documents dated October 22, 1973, were executed in the wake of the October 16, 1973, loan application evidencing the full awareness by all parties of the changed circumstances of Paneling and the Bankrupt. (*See* Trustee's Exhibit "A").

As to said changed circumstances, it should also be noted that at the time of the original loan application, the Bankrupt had not yet begun to function as the wholesaler and "parent" of the Georgia Paneling group. After its establishment at the Mimms Drive Location, which Appellants at pages 8 and 9 of their original Motion and in their Brief at page 6 concede took place subsequent to the June loan application form, the Bankrupt operated as the wholesale operation arm of the Georgia Paneling group and made all purchases of supplies, which it consigned to the other stores in the Georgia Paneling group for sale to the public. *See* Vol. I, Locke Deposition (5/10/77) at pages 10-14, (Trustee's Exhibit "D"); Vol. II, Locke Deposition (5/11/77) at pages 64-68; Locke Deposition (9/20/74) at pages 7, 11-12 and 40, (Trustee's Exhibit "G"); First Meeting of Creditors at pages 18-21, 24-26. As Mr. Locke's testimony

makes abundantly clear, the Bankrupt owned all of the inventory sold by the Georgia Paneling group of companies. All receivables generated by such retail sales of its inventory were treated as receivables of the Bankrupt which it assigned to Aetna. *See also* Affidavit of Ann G. Roberts, attached to Appellants' Brief, at paragraph 23. The money advanced by Aetna against these receivables was advanced to the Bankrupt, which, unlike the retail stores in the group, required funds to replenish its inventory and to continue to place the inventory on consignment with the retail stores. Mr. Locke unequivocally stated that the retail stores in the Georgia Paneling group owned neither the inventory sold nor the receivables generated from such sales, all of which were owned by the Bankrupt. Because the retail stores actually sold the inventory to the public, it is logical that they would use their own invoices to reflect such sales rather than invoices bearing the name of the Bankrupt. That Aetna fully understood the aforedescribed operational arrangements of the Paneling group is clearly evidenced by its own interoffice memorandum of October 16, 1973, precisely detailing the same (*See* Trustee's Exhibit "H"). Again, it would seem unreasonable, if not inconceivable, that Aetna with full awareness of the facts would make loans to "shell corporations" and "sales agents" as opposed to the Bankrupt.

As the Trustee correctly observes, the statement by the Aetna officer to the effect that there was just "one loan" made to the Bankrupt and the Georgia Paneling group must be read in the context within which it was made. Such a reading will certainly suggest he merely meant that since the companies were under common management, ownership and control and viewed by Aetna in this light, Aetna needed to document the loan in the name of each of the companies, to obtain corporate guaranties from each for the debts of the others, and to perfect security interests in the property of each of the companies. This was felt necessary due to the frequent physical transfer of inventory from the Bankrupt to the retail companies and the fact that most of the Bankrupt's receivables were generated by sales through the retail companies of inventory consigned to them by the Bankrupt. At the same time, Aetna understandably wanted the advances on its "one

loan" to the Bankrupt to be handled through one bank account in the name of the Bankrupt. (*See* Trustee's Exhibits "A", "E", "F", "H", and "I", the latter being the deposition of Charles R. White, 5/3/77, containing the referenced statement of an Aetna officer at pages 153-155).

As to Appellants' analysis of the invoices, again reference need only be made to the aforecited testimony of Mr. Locke who indicated that all accounts of the Georgia Paneling group were owned by the Bankrupt and, therefore, must necessarily have been pledged to Aetna by Bankrupt. Even assuming that each of the invoices referred to by Appellants was actually pledged to Aetna, there is nothing in the record to indicate their being pleged by anyone other than the Bankrupt, the owner of the accounts receivable evidenced by the invoices. Further, various correspondence to Aetna on the letterhead of the Bankrupt indicates its active authority and responsibility with respect to the pledging of accounts. (*See* Trustee's Exhibit "J"). Even assuming that Appellants' analysis of the various invoices should be taken at face value and without consideration of the circumstances which explain the reason why Paneling invoices were in the Bankrupt's possession rather than Paneling's possession, the affidavit attached to Appellants' First Amendment to their Motion reflects that approximately 20% of the invoices which totalled about $156,833.48 were invoices on the Bankrupt's letterhead. Appellants would therefore be required to admit, even under their theory of the facts, that Aetna did advance sums of money to the Bankrupt pursuant to an assignment of these invoices and that the Bankrupt was accordingly more than a "mere guarantor" of Paneling's alleged indebtedness to Aenta.

Finally, the appearance of the name of Paneling in the headings of the MTD Transaction Summaries (Trustee's Exhibit "B") is at best indication only that Paneling was the name initially placed in a computer to designate the account. The similarity of the corporate names of the Bankrupt and Paneling also could account for the use of "Ga. Paneling Co." on these Summaries. As noted, the substantive portions of the MTD's evidence the fact of cash transactions between Aetna and the Bankrupt in a manner completely consistent with the clear meaning of the

language appearing in the written loan agreements between Aetna and the Bankrupt. (*See* Trustee's Exhibits "B" and"C"). In view of the history of the structural changes in the Paneling group, the name in the heading is unpersuasive and insufficient as evidence, if not irrelevant, for the purpose of overcoming the writings, documents and oral testimony of the parties and disproving the existence of the cash advances to the Bankrupt which they clearly demonstate.

Appellants have simply failed to offer any rebuttal to the fact that the Bankrupt executed an accounts receivable financing agreement with Aetna, forwarded its invoices as well as those of Paneling to Aetna and received substantial sums by wire transfer advances from Aetna against the invoices thus assigned. From a review of the record, it is clear, contrary to the contentions of Appellants, that a loan and indebtedness existed between Aetna and the Bankrupt, and that the foreclosure by Aetna on the assets of the Bankrupt was in exercise of its rights under the written agreements evidencing said loan and indebtedness.

With regard to Appellants' contentions that Aetna wrongfully retained the proceeds of insurance paid as a result of the fire at the Forest Park company, the loan agreements show that Aetna was entitled to be the loss payee with respect to any such fire insurance proceeds and that Aetna had a security interest in the inventory of the Bankrupt located at the Forest Park store. (*See* Trustee's Exhibit "A"). Even if it were conceded for the purpose of argument that Aetna was not entitled to such proceeds with respect to the equipment, the injured party would be Ann Roberts and not the Bankrupt as Appellants content.[sic]* Further, the proceeds retained by Aetna actually reduced the Bankrupt's debt to Aetna. Appellants' argument that the retention of the fire insurance proceeds prevented the rebuilding of the Forest Park store and thereby injured Paneling or the Bankrupt by depriving it

*In fact, Appellants concede that Aetna used a portion of the insurance proceeds to pay off an indebtedness of Ann Roberts to the First National Bank, which had a security interest in the equipment. There is, therefore, some question whether Ann Roberts was injured by Aetna's actions, even assuming the truth of Appellants' assertions.

of substantial cash flow is too speculative to merit comment. Nor is there anything of probative value in the record to demonstrate that this was the case. Aetna did not cause the fire and it was entitled to receive the proceeds of insurance as proceeds of its collateral. Finally, Appellants' theory that Aetna's sole motivation in having the January loan documents executed was in order for it to obtain the insurance proceeds is completely implausible inasmuch as Aetna was already entitled to those proceeds under the June loan documents.

Apart from the lack of merit and probative value of the evidence which Appellants claim supports their Motion under subparagraph (2) of Rule 60(b), the Court believes that such evidence was either known, or by the exercise of due diligence could have been discovered, by Appellants prior to the May 18th hearing or within ten days thereafter. Appellants' counsel admits that he had reviewed all of the pertinent loan documents well before the May 18th hearing. In addition, Appellants' counsel was present at the first meeting of creditors of the Bankrupt and attended the depositions of T. R. Locke (taken on September 9, 1974) and of J. Wayne French (taken on September 20, 1974), from which he learned about the fire at the Forest Park warehouse, the payment to Aetna of the insurance proceeds, the structure of the Bankrupt as wholesaler to the Georgia Paneling group as retail stores and the accounts receivable financing arrangement between Aetna and Bankrupt. *See* Affidavit of W. Kent Bishop, attached to Appellants' Brief, at paragraph 17-22. Appellants therefore had at their disposal most of the facts which they now claim to be newly discovered. Appellants have offered no reason for their failure to obtain prior to the May 18th settlement hearing copies of the MTD Transaction Summaries and the various Paneling invoices. The invoices, at least, were in the possession of the Bankrupt or the Trustee prior to the May 18th hearing and Appellants could have examined them as a matter of right at any time upon request. The Court concludes that, rather than having uncovered newly discovered evidence, Appellants have simply come forward with newly thought of theories. Neither their "new evidence" nor their "new theories" is persuasive in light of the overwhelming evidence in support of the Trustee's position and, had such evidence and

theories been presented at the May 18th hearing, the Court's ruling would have been no different than it was with respect to the Trustee's settlement application.

Finally, the Court concludes that Appellants have demonstrated no reason for their failure to file the instant Motion sooner than they did. Although their Motion was filed with the District Court barely within the one-year maximum period allowed by Rule 60(b), the Court nonetheless believes that the Motion was not filed within a reasonable period of time after the entry of this Court's order of June 17th and was motivated primarily as a substitute for an appeal from the District Court's affirmance of that order.

Conclusion

A hearing on a motion under Rule 60(b) is not intended to serve as a trial on the merits of the controversy out of which resulted the order from which the movant seeks relief. Rather, such a hearing is designed to afford the movant an opportunity to inform the Court of the existence of concrete evidence which would support his motion and which would warrant setting aside the Court's order. In the instant case, Appellants have used a "shot-gun approach" by raising as many issues of fact and theories of law as could be mustered by their counsel in the apparent hope that one or more of such issues and theories might be persuasive to the Court. They have utterly failed to demonstrate to the Court the existence of any evidence that would entitle them to the relief requested by their Motion and they have had more than ample time and opportunity to do so. In short, Appellants have failed to carry their burden of proof.

As the Court noted in its June 17th order, a hearing on a Section 27 settlement application is not intended to serve as a trial on the merits of the matter to be settled. The purpose of such an application is to resolve a controversy short of a trial and it is the responsiblity of the Court to assess whether the settlement is fair under all the circumstances. Doubtless it is that in commercial matters counsel for objecting creditors can conjur up a host of factual and legal issues which might be argued at trial, and urge such

issues as reasons for requiring the matter to be litigated rather than settled. However, the Court must examine, among other things, the probability of success or failure on the merits and the expense of the litigation in passing upon such a settlement application. In the instant case the settlement was approved with such considerations in mind and that approval was affirmed on appeal. Appellants now argue that Rule 60(b) should afford them relief. The Court has reviewed Appellants' asserted grounds for such relief and finds them unpersuasive, largely speculative and in many respects frivolous.

Accordingly, for all of the reasons stated in this Opinion, the Court hereby DENIES Appellants' Motion and will schedule a hearing upon the Trustee's application and that of Aetna for an assessment of attorney's fees against Appellants.

This 5th day of January, 1978.

/s/ WILLIAM L. NORTON, JR.
U. S. BANKRUPTCY JUDGE
U. S. DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

GEORGIA PANELING SUPPLY, INC.

B74-1628A

[Filed April 15, 1977]

ORDER

This is an appeal from the order of the bankruptcy judge entered June 17, 1976, approving the application of the trustee for settlement of certain claims against Aetna Business Credit, Inc., one of the defendants in a plenary action brought by the trustee to set aside certain voidable preferences and/or fraudulent transfers. *See Pennington, Trustee v. Aetna Business Credit, Inc., et al.*, Civil Action No.75-1540A (N.D. Ga.) Appellants herein further appeal from the denial of their application to remove the trustee and to appoint a successor trustee.

There are several grounds for appeal; however, they can be conveniently divided into two basic categories: (1) jurisdictional and (2) substantive. Appellant contends that since the plenary action is presently before this court, this court rather than the bankruptcy judge had exclusive jurisdiction to entertain any application for settlement in the plenary action, or at the very least, under principles of judicial comity or quasi-abstention the bankruptcy judge should have avoided ruling on the merits of the application for settlement because this court was to a considerable extent embroiled in the instant controversy, as well as the bankruptcy court. Secondly, appellants contend that the settlement of such claims against Aetna is contrary to the interests of the estate. We disagree with the appellants in both respects.

The appellants herein are seven unsecured creditors of the bankrupt, who have been allowed to intervene in the plenary action before this court by an order entered September 30, 1976. In that order, we noted that the appellants, as unsecured creditors who had provided supplies to

the bankrupt when it was arguably insolvent, and at a time when such insolvency was allegedly known to Aetna, had significant and protectable property interests in the action, and that their ability to protect such interests might be impaired or frustrated by the action or inaction of the trustee. Accordingly, the court allowed filed their amended complaint; however, in an order dated February 25, 1977, this court dismissed several of the counts of their complaint for lack of standing and for failure to state a claim upon which relief can be granted, since several of the causes of action asserted were under well settled bankruptcy principles unique to the trustee, who stands in the shoes of the bankrupt. Essentially the intervenors' claims that remain pending in the plenary action, and those which they alone have standing to assert, are in essence bottomed upon common law fraud and deceit and conversion.

In the bankruptcy action herein, the trustee applied to the bankruptcy judge for approval of a compromise and settlement of the trustee's action against Aetna in consideration of $350.00. Section 27 of the Bankruptcy Act, 11 U.S.C. Sec. 50 provides that:

> A receiver or trustee may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he may deem for the best interest of the estate.

As a general proposition the compromise and settlement should not be set aside unless the record clearly demonstrates that the court has acted arbitrarily or that the compromise itself actually is not in the best interests of the estate. *In re Kansas City Journal-Post Co.*, 144 F.2d 816, 817 (8th Cir. 1944); *Ashbach v. Kirtley*, 289 F.2d 159 (8th Cir. 1961). In determining the advisability of accepting an offer of compromise in the bankruptcy context, many considerations are relevant, including, but not limited to (1) the probability of success in the litigation, (2) the difficulties, if any, to be encountered in the matter of collection, (3) the complexity of the litigation involved, and the expense, inconvenience, and delay necessarily attending it; and (4) the paramount interests of the bankrupt's credi-

tors. *Drexel v. Loomis*, 35 F.2d 800, 806 (8th Cir. 1925).

In sum, the question before the court is whether the proposed settlement represents a "reasonable evaluation of the risks of the litigation." *Florida Trailer and Equipment Co. v. Deal*, 284 F.2d 567, 571 (5th Cir. 1960). The Fifth Circuit has clearly articulated the legal standard and reasoning process with which to explore that inquiry, stating:

> Of course, the approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claim or counterclaim is or is not worthless or valuable. The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation. But the very uncertainties of outcome in litigation, as well as the avoidance of wasteful litigation and expense, lay behind the Congressonal infusion of a power to compromise. This is a recognition of the policy of the law generally to encourage settlements. This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval would necessarily result in a judicial determination that there was no escape from liability or no hope of recovery and hence no basis for a compromise.

Id. at 571.

The wisdom of this reasoning cannot be doubted in light of the judicial approval that such reflections have attained in both the bankruptcy context, *e.g., Matter of Equity Funding Corp. of America*, 416 F. Supp. 132 (C.D. Cal. 1975), and even in situations outside the bankruptcy context. *E.g., Allegheny-Ludlum Industries, Inc.*[sic], 517 F.2d 826 (5th Cir. 1975).

Nevertheless, although courts do not ordinarily scrutinize the merits of compromises involved in suits between individual litigants, it is essential that in bankruptcy proceedings proposed settlements receive the "informed

independent judgment of the bankruptcy court" and such an informed decision can only be premised upon sufficient investigation and judicial inquiry into the facts. *See, e.g., Protective Committee v. Anderson,* 390 U.S. 414, 424-25 (1968); *In re Albert Harris, Inc.,* 313 F.2d 447 (6th Cir. 1963); *Ashbach v. Kirtley, supra; See also Upson v. Otis,* 155 F.2d 606 (2d Cir. 1946); *Conway v. Silesian-American Corp.,* 186 F.2d 201 (2d Cir. 1950).

At the hearing held to consider the application for approval of the settlement, the attorney for the trustee stated that he first learned of the possibility that Aetna had been given a voidable preference at a deposition in which one of Aetna's officers stated that when Aetna took possession of the inventory and receivables, Aetna may have received approximately $2,000.00 excess over the amount of the bankrupt's obligation to it. However, through later investigation, albeit informal, the trustee became aware that the security interest had been perfected more than four months prior to the filing of the bankruptcy petition and further that under the terms of the security agreement Aetna was entitled to recover costs of collection and attorney's fees in connection with the enforcement of its perfected interest. The attorney further stated that while the occurrences certainly supported some inference or a claim of fraud against Aetna, in the sense that Aetna allegedly knew of the bankrupt's insolvency and allowed unknowing unsecured creditors to deliver supplies and material so that Aetna could take over a substantial inventory when it enforced its rights as a secured creditor, the bankrupt was not thereby injured since its obligations had been satisifed. At the most, any fraud or deceit that had been perpetrated was injurious to several unsecured creditors who continued to supply the debtor unwittingly and without knowledge of the bankrupt's insolvency, rather than the bankrupt itself. Thus, on the basis of several decisions and discussions, he concluded particularly in light of one decision, *Cissel v. Home Assurance Co.,* 521 F.2d 790 (6th Cir. 1975), *cert denied,* 95 S. Ct. 957, that although there might be claims for fraud and conversion arising out of the transaction, he, as the trustee, did not have standing to pursue them. Moreover, to the extent that the original complaint may have indicated that Aetna had acted in a commercially unreasonable

manner in exercising its rights under the security agreement, it became evident that the officers and principals of the bankrupt had voluntarily and knowingly consented to Aetna's exercise of its rights as a secured party, with the result that any claims by the bankrupt based on violations of Article 9 of the U.C.C. were less than credible. In sum, in view of his threshold standing disabilities and recognizing the unlikelihood of success on the voidable preference claims, the trustee concluded that it would be preferable to settle his claims against Aetna so that he would pursue more vigorously the claims against C & S, upon which he believed he had a much higher probability of success and from which all the creditors of the bankrupt would stand to benefit. On the other hand, several of the appellants herein had already instituted their own actions for fraud and conversion, which they, of course, had standing to do, since they were the ones allegedly injured by Aetna's conduct.

Arguably, the bankruptcy judge might have required the trustee to produce more detailed evidence as to the probable lack of success on the merits of his voidable preference action; however, since his decision to settle the action was premised primarily on his lack of standing — which is wholly a legal conclusion rather than factual — the evidence presented was sufficient to support the bankruptcy decision to approve the compromise and settlement. In sum, the bankruptcy judge did not err in failing to require more evidence, and we are unable to conclude that the bankruptcy judge's findings are clearly erroneous or contrary to the best interests of the estate as a whole.

Accordingly, for the reasons hereinabove expressed, the bankruptcy judge's order of June 17, 1976, granting the application of the trustee to settle and compromise his claims against Aetna in the pending plenary action is hereby AFFIRMED and is hereby AFFIRMED in all other respects.

IT IS SO ORDERED.

This, the 15th day of April, 1977.

/s/ RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt

Bankruptcy Case No. B74-1628A

[Filed June 17, 1976]

ORDER

On May 18, 1976, a hearing was held before this Court on the application of John C. Pennington, Trustee of the estate of Georgia Paneling Supply, Inc. the above-named Bankrupt, for leave to settle and compromise a certain controversy and on the application filed by seven unsecured creditors of the estate to remove the Trustee and to appoint a named successor trustee.[1]

The Trustee's application seeks leave of this Court to settle with Aetna Business Credit, Inc. (hereinafter "Aetna") a lawsuit brought by the Trustee against Aetna and The C & S Bank of North Fulton (hereinafter 'C & S"), which is pending in the United States District Court for the Northern District of Georgia, Atlanta Division, as civil action number C75-1540A. The application of the unsecured creditors, who appeared in opposition to the Trustee's application to settle and compromise, seeks to remove the Trustee and to appoint a named successor trustee to prosecute the pending action against Aetna and C & S.[2] At the time of the hearing, counsel for the unsecured creditors filed an additional application requesting the Court to decline to rule on the Trustee's application and to leave to the District Court Judge before whom the Trustee's action is pending the decision whether the proposed

[1] The seven unsecured creditors represented were International Paper Company, Walter E. Heller & Company (Inc.), Johns-Manville Sales Corporation, Versapanel, Inc., Goldrey[sic] Forest Products, Inc., and White Lumber Sales, Inc.

[2] The application of the unsecured creditors also requests that counsel representing them be retained to represent the successor trustee in the action pending against Aetna and C & S.

settlement between the Trustee and Aetna is in the best interests of the estate in bankruptcy.

The Court having heard argument of counsel appearing on behalf of the Trustee, Aetna and the unsecured creditors, and having considered all pleadings and matters before it, hereby makes the following findings of facts and conclusions of law:

Findings of Fact

On July 29, 1974, Georgia Paneling Supply, Inc. (hereinafter "the Bankrupt") was adjudicated a bankrupt upon a petition filed against it by several of its unsecured creditors. Thereafter, on September 10, 1974, John C. Pennington was appointed and duly qualified as Trustee of the Bankrupt's estate.

Prior to the filing by the Trustee of his action against Aetna and C & S, three unsecured creditors of the Bankrupt — Continental Forest Products, Inc., Hampton Lumber Sales Company and Walter E. Heller & Company (Inc.) — had filed separate civil actions against Aetna for alleged fraud and conversion committed by Aetna in connection with its foreclosure as a secured creditor in June of 1974 upon inventory of the Bankrupt. The Hampton and Heller lawsuits are now pending in the United States District Court for the Northern District of Georgia and the Continental lawsuit is currently before the Civil Court of Fulton County.[3] These three creditor plaintiffs essentially allege in their respective complaints that Aetna, in foreclosing upon inventory of the Bankrupt during June of 1974, fraudulently obtained possession of their lumber which had been sold the the Bankrupt on credit and

[3] The District Court actions are captioned as follows: *Hampton Lumber Sales Company* v. *Aetna Business Credit, Inc.* (Civil Action No. C74-1679A); *Walter E. Heller & Company (Inc.)* v. *Aetna Business Credit, Inc.* (Civil Action No. C75-216A).

The state court action is captioned as follows: *Continental Forest Products, Inc.* v. *Aetan[sic] Business Credit, Inc.* (Civil Action No. 493498).

Counsel for the seven unsecured creditors appearing in opposition to the Trustee's application to settle also represents Hampton and Heller in the two District Court actions.

converted this lumber to its own use by selling the lumber to liquidate the indebtedness of the Bankrupt to Aetna.

Following his appointment and qualification, the Trustee was informed of the pendency of these three creditor actions and was invited by counsel for the two creditor plaintiffs suing in federal court to attend a deposition that was scheduled to be taken of an officer of Aetna in order that the Trustee might determine whether plenary proceedings should be instituted by him against Aetna on behalf of the Bankrupt's estate. As a result of certain testimony given at this deposition to the effect that Aetna may have collected from its foreclosure an amount in excess of the indebtedness owed it by the Bankrupt, the Trustee filed a civil action against Aetna on July 9, 1975, in the Superior Court of Fulton County, wherein he alleged that Aetna acted fraudulently with respect to the unsecured creditor/suppliers of the Bankrupt and sought to avoid and to recover for the estate the amount of alleged preferential transfers suffered by the Bankrupt and received by Aetna. The Trustee's action was subsequently removed to the United States District Court for the Northern District of Georgia, where at the time of the Trustee's instant application, it was pending as civil action file number 75-1540A.

After conducting informal discovery and having received additional information from counsel for Hampton and Heller, the Trustee concluded that Aetna had a valid perfected security interest in the inventory of the Bankrupt; that the amount of money which Aetna had allegedly collected in excess of the indebtedness owed it by the Bankrupt represented the costs and attorney's fees incurred by Aetna in connection with the foreclosure, which under its security and loan agreements with the Bankrupt, it was entitled to retain; and that there was a serious question whether the Trustee had legal standing to prosecute on behalf of the estate the fraud claims affecting only a limited number of unsecured creditor/suppliers of the Bankrupt.

Accordingly, the Trustee and Aetna entered into settlement negotiations, which resulted in an agreement to settle the lawsuit with Aetna for $350.00, subject to the approval and confirmation of this Court. On January 20, 1976, the Trustee made application to the Court to settle

his claim against Aetna for the aforesaid amount and a hearing was held the same day. At this hearing were present counsel for the Trustee, counsel for Aetna and counsel for the seven unsecured creditors, which appeared in opposition to the settlement proposal. After hearing all counsel present, the Court determined at the request of counsel for the unsecured creditors to defer consideration of the fairness of the proposed settlement in order that counsel for the creditors might have an opportunity to submit to the court a legal brief on the issues raised.

Several months elapsed without any brief having been filed with the Court by any party and again the Trustee made application to the Court to settle and compromise his claim against Aetna. Shortly thereafter, the seven unsecured creditors filed an application to remove the Trustee on the grounds that the Trustee has failed to discharge the duties of his office by agreeing to settle his suit against Aetna upon the terms proposed without having conducted formal discovery. On May 18, 1976, a hearing was held on the Trustee's application and the application of the seven unsecured creditors, at which time counsel for the unsecured creditors presented an additional application to the Court requesting that the Court refrain from ruling on the Trustee's application on the ground that the District Court Judge before whom the Trustee's action was pending was better situated to determine the fairness of the settlement proposal.

Conclusions of Law

The Court feels constrained to address first the question whether it should refrain from ruling on the Trustee's application in order that the District Court Judge before whom the action is pending may entertain consideration of the fairness of the proposed settlement. The seven unsecured creditors argue that the Court should decline to rule, but they do not contend that the Court does not have the authority to rule. Section 27 of the Bankruptcy Act confers the requisite authority upon this court by providing that a trustee "may, with the approval of the court, compromise any controversy arising in the administration of the estate upon such terms as he deems for the best interest of the

estate." *See also* Bankruptcy Act Sec. 2a(7) (granting jurisdiction to the Bankruptcy Court to determine controversies). It cannot be doubted that this Court has authority to approve or disapprove a settlement of the type presented by the Trustee herein. *See generally* 2A Collier, *Bankruptcy* Sec. 27.02 (14th ed. 1974). Accordingly, the question reduces itself to one solely as to whether the Court *should* decline to rule. The unsecured creditors maintain that the Court should because it does not have all the facts and pleadings before it. Yet, the material facts of the case are uncontested, the issues well defined, and, as conceded by these creditors, the absence of formal discovery by the Trustee in this case leaves little before the District Court Judge that is not already before this Court. This aside, however, the Court is of the opinion that it would be an abdication of the Court's responsibility to decline to rule upon a matter which it has the authority to decide and which has been duly brought before it for decision. Accordingly, this application of the unsecured creditors is denied.

The second matter before the Court is the Trustee's application to settle his claim against Aetna upon the terms previously discussed. In passing upon an application to settle a claim asserted by a trustee in bankruptcy, the Court should be guided by what it perceives to be in the best interests of the estate. *See* 2A Collier, *supra* Sec. 27.04 at 1092. A determination of what is in the best interests of the estate requires consideration of a number of variables, including those set forth in *Drexel v. Loomis*, 35 F.2d 800 (8th Cir. 1929):

> "(a) The probability of success in the litigation; (b) the difficulties, if any to be encountered in the matter of collection; (c) the complexity of the litigation involved, and the expense, inconvenience and delay necessarily attending it; (d) the paramount interest of the creditors and a proper deference to their reasonable views in the premises."

Applying the first of the above-quoted criteria to the instant case, the Trustee contends, and the Court is inclined to agree, that the probability of success in the litigation against Aetna is negligible. The essence of the

Trustee's complaint is that Aetna received a voidable preference from the Bankrupt. Aetna maintains, and the Trustee after investigation concedes, that Aetna had a valid security interest in the accounts receivable and inventory of the Bankrupt which was perfected more than four months before the date of bankruptcy. The law is well established that a security interest perfected more than four months prior to bankruptcy is immune from attack by a bankruptcy trustee, even though the security interest does not attach to the collateral until some time within the four-month period. *See, e.g., In re Wileo Forest Machinery, Inc.,* 491 F.2d 1041 (5th Cir. 1974); *In re King - Porter Company,* 446 F.2d 722 (5th Cir. 1971); *DuBay v. Williams,* 417 F.2d 1277 (9th Cir. 1969), *cert. denied sub nom., France v. Union Bank & Savings Co.,* 396 U.S. 827 (1969). Since neither the Trustee in his complaint nor any unsecured creditor of the estate allege any wrongdoing by Aetna in connection with its foreclosure upon the Bankrupt's property which resulted in injury to the Bankrupt,[4] the Court agrees with the Trustee that his voidable preference claim is substantially without merit and that his probability of success on this claim is slight.

As to the fraud theory asserted by the Trustee, Aetna has contended throughout the course of the litigation, and the Trustee upon careful review has become convinced, since the filing of his Complaint, that there is considerable doubt whether the Trustee has standing to maintain an action for fraud on behalf of the estate where the fraud alleged to have occurred injured only certain unsecured creditor/suppliers of the Bankrupt. Essentially, the Trustee

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[4] Of course, as previously discussed, the Trustee originally believed that Aetna had collected a sum in excess of the amount owed it by the Bankrupt. Subsequent investigation, however, revealed that these sums were retained by Aetna as and for the costs and attorney's fees incurred in collection which it was entitled to retain under its agreements with the Bankrupt.

Counsel for the seven unsecured creditors argues further that Aetna acted in a commercially unreasonable manner in foreclosing upon the collateral. No allegations of commercial unreasonableness, however, appear in the Trustee's complaint, nor does counsel for the unsecured creditors point to any fact or suggest any basis for believing that Aetna may have acted in a commercially unreasonable manner as to the Bankrupt.

alleges in his Complaint that Aetna, with knowledge of the Bankrupt's insolvency, allowed unsecured creditor/suppliers of the Bankrupt to sell lumber to the Bankrupt on credit in order that Aetna might foreclose upon its inventory lien at a time when the Bankrupt's inventory was sufficient for this purpose. Taking these allegations as true for the purpose of this hearing, the Court feels that it is these unsecured creditor/suppliers, rather than the Bankrupt, who were deceived and injured and they, rather than the Trustee, who have standing to assert a claim for recovery against Aetna. It is a fundamental principle that a bankruptcy trustee steps into the shoes of the bankrupt and has standing to bring any action which the bankrupt could have brought had the bankrupt remained solvent and bankruptcy not intervened. *See. e.g., Cissell v. American Home Assurance,* 521 F.2d 790 (6th Cir. 1975); *Bayliss v. Rood,* 424 F.2d 142 (4th Cir. 1970). A trustee may not sue upon claims not belonging to the estate even if they were assigned to him by creditors for convenience or other purposes. *See, In re Petroleum Corp. of America,* 417 F.2d 929 (8th Cir. 1969). In the Trustee's action, it is clear that, if bankruptcy had not intervened, the Bankrupt could not have maintained an action against Aetna for fraud committed against and injuring only unsecured creditor/suppliers of the Bankrupt. Hence, the Court believe[sic] that the question of standing might very well be resolved adversely to the trustee were this action to be continued against Aetna.[5]

In assessing the risks of litigation to the Trustee, the Court does not undertake nor does it presume to pass finally upon the merits of the Trustee's claims. Rather, the court seeks only to ascertain whether there are such risks

[5] The unsecured creditor/suppliers are not prejudiced by this settlement since they can always file their own actions to recover for injuries they sustained by reason of Aetna's alleged fraud, as indeed three such creditors have already done. Moreoever, it is interesting to note that, were the Trustee to recover on their behalf in his action, these unsecured creditor/suppliers would be forced to share pro rata in the recovery with all unsecured creditors of the estate. If, on the other hand, these creditors were to recover in separate actions against Aetna, they would be entitled to retain the full amount of any award of damages received.

and whether these risks are substantial enough to warrant approval of the settlement proposed. In this respect, the Court is mindful of the observation appearing in *Florida Trailer and Equipment Co. v. Deal,* 284 F.2d 567 (5th Cir. 1960), wherein the Fifth Circuit Court of Appeals stated:

> "Of course, the approval of a proposed settlement does not depend on establishing as a matter of legal certainty that the subject claim . . . is or is not worthless or valuable. *The probable outcome in the event of litigation, the relative advantages and disadvantages are, of course, relevant factors for evaluation.* But the very uncertainies of outcome in litigation and expense lay behind the Congressional infusion of power to encourage settlement. *This could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty . . .*"

Id. at 571 (emphasis added).

From an examination of the Trustee's action, and based upon the Trustee's own analysis of the case, the Court is satisfied that substantial litigation risks are present and that the existence of such risks are an overriding consideration in the determination whether to approve the proposed settlement.[6] Moreover, it should be observed that the determination to settle this controversy upon the terms proposed is a judgment decision of the Trustee acting in his fiduciary capacity and based upon his assessment of the facts and circumstances of the case following the filing of his action. Upon a review of the Trustee's application and after hearing all parties concerned, the Court believes that the Trustee's assessment is reasonable and not erroneous.

Obviously, the Court must accord due respect to the reasonable views of the unsecured creditors of the estate in passing upon the instant application of the Trustee. While

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[6] The Court also notes that the present posture of the case is highly favorable to Aetna, which has three motions pending against the Trustee — one to compel discovery, a second for sanctions and a third to dismiss the action — each of which motions remain unopposed by the Trustee.

seven of the Bankrupt's unsecured creditors oppose the settlement, the Court is compelled to find that their opposition is not warranted under the circumstances. Counsel for the unsecured creditors argues that the sum for which the Trustee has agreed to settle his suit as to Aetna is unreasonable in view of the amount of damages that the Trustee originally sought to recover from Aetna in his Complaint. True, the settlement sum may appear trivial to these unsecured creditors, but no more trivial than the likelihood of recovery of any amount by the Trustee in the instant case. The amount ultimately recovered from Aetna through litigation might very likely prove to be less than the amount of the settlement proposal. Moreover, by settling a questionable claim against Aetna, the Trustee is able to devote his full energies and attention to his claim against C & S, which he believes to be more valuable to the estate and more certain of recovery. For the foregoing reasons, the Court feels that, notwithstanding the opposition of these creditors, the proposed settlement is in the best interest of the estate and should therefore be approved.

Turning to the application of the unsecured creditors to remove the Trustee and to appoint a successor trustee to prosecute the claim against Aetna, the Court feels that this application is now moot by reason of the Court's decision to approve the proposed settlement. Moreover, the Court feels that no grounds have been shown for the removal of the Trustee, who the Court feels has faithfully discharged the responsibilities and duties of his office, not only in the instant bankruptcy case, but also in numerous bankruptcy cases before this Court in the past. Furthermore, the Court notes that the creditors' application was conditioned upon the appointment of counsel for the applicants to serve as counsel for the successor trustee. The Court is of the opinion that the potential conflict of interests might arise were counsel for the seven unsecured creditors, two of which are already represented by the same counsel in separate actions brought by them against Aetna, likewise to represent a successor trustee.

It is, therefore, ORDERED, ADJUDGED AND DECREED, that the aplication of the Trustee to settle and compromise is hereby approved and granted; that the ap-

plication of the unsecured creditors to remove the Trustee and to appoint a successor trustee is denied; that the application of the unsecured creditors requesting the Court to decline to rule on the Trustee's application is denied; and that the Release of the Trustee of his claims against Aetna, a copy of which is attached hereto as Exhibit "A", is hereby approved.

So ordered in Atlanta, Georgia, this 16th day of June, 1976.

/s/ WILLIAM L. NORTON, JR.
UNITED STATES BANKRUPTCY JUDGE
UNITED STATES BANKRUPTCY COURT
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 79-1076

D. C. Docket No. B74-1628

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt,

INTERNATIONAL PAPER COMPANY, WHITE LUMBER SALES, INC., QUINAULT PACIFIC CORPORATION and GOLD REY FOREST PRODUCTS, INC., Appellants,

versus

JOHN C. PENNINGTON, TRUSTEE and AETNA BUSINESS CREDIT, INC., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

Before **HATCHETT** and **TATE**, Circuit Judges and **GROOMS***, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that appellants pay to appellees the costs on appeal to be taxed by the Clerk of this Court.

May 8, 1980 [Filed July 22, 1980]

ISSUED AS MANDATE: JUNE 20, 1980

*District Judge of the Northern District of Ala., sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1076

D. C. Docket No. B74-1628

In the Matter of:
GEORGIA PANELING SUPPLY, INC., Bankrupt,

INTERNATIONAL PAPER COMPANY,
WHITE LUMBER SALES, INC.,
QUINAULT PACIFIC CORPORATION and
GOLD REY FOREST PRODUCTS, INC., Appellants,

versus

JOHN C. PENNINGTON, TRUSTEE and
AETNA BUSINESS CREDIT, INC., Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Before **GODBOLD, REAVELY** and **ANDERSON,** Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that the appellants pay to the appellees the costs on appeal, to be taxed by the Clerk of this Court.

November 19, 1979 [Filed June 20, 1980]

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70131

July 22, 1980

Mr. Ben H. Carter, Clerk
United States District Court
2211 U.S. Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303

78-3370 - In the Matter of
Georgia Paneling Supply, Inc., Bankrupt;
International Paper Co., et al., v.
John C. Pennington, etc., et al.

79-1076 - In the Matter of
Georgia Paneling Supply, Inc., Bankrupt;
International Paper Co., etc., et al.

(USDC Nos. B 74-1628-A & B74-1628)

Dear Sir:

On June 20, 1980 this Court's judgments as mandate issued in the above causes. Those judgments were erroneously prepared on the first opinion of November 9, 1979 in case No. 78-3370 and the first opinion of November 19, 1979 in case No. 79-1076, which were vacated by this Court's order of December 28, 1979.

I am therefore requesting that you please return to this office the judgment previously issued in each of the above causes and I enclose to you and each of the attorneys in the

cases the corrected judgments which should have been issued on June 20, 1980.

Very truly yours,
GILBERT F. GANUCHEAU, Clerk
By /s/ Susan B. Vaughn
Case Manager

SBV:nb
Encl.
cc:w/enc.
Mr. Winford Kent Bishop
Mr. Ben H. Swank, Jr.
Mr. Douglas L. Cronkright
Mr. C. Edward Dobbs
Mr. R. William Ide, III
Mr. John C. Pennington

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 79-1076

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt,

INTERNATIONAL PAPER COMPANY, WHITE LUMBER SALES, INC., QUINAULT PACIFIC CORPORATION and GOLD REY FOREST PRODUCT, INC., Appellants,

versus

JOHN C. PENNINGTON, TRUSTEE and AETNA BUSINESS CREDIT, INC., Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion May 8, 1980, 5 Cir., 197__, _____ F.2d____).
([Filed June 3, 1980])

Before **HATCHETT** and **TATE,** Circuit Judges and **GROOMS***, District Judge.

PER CURIAM:
(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petiton for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule

35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:
/s/ ALBERT C. TATE
United States Circuit Judge

Form 704-2

*District Judge of the Northern District of Ala., sitting by designation.

Part Two "Fee Award Case"

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3370

In the Matter of:
GEORGIA PANELING SUPPLY, INC., Bankrupt,

INTERNATIONAL PAPER COMPANY, ET AL.,
Appellants,

versus

JOHN C. PENNINGTON, TRUSTEE
AETNA BUSINESS CREDIT, INC. and
FREEMAN & HAWKINS, Appellees.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

(May 9, 1980)

Before **HATCHETT** and **TATE,** Circuit Judges and **GROOMS***, District Judge.

PER CURIAM:

Rehearing was granted, 613 F.2d 512[sic] (Table, December 28, 1979), vacating our unpublished panel opinion, 607 F.2d 1004 (Table, November 9, 1979), which had affirmed an award of attorney's fees against the appellants. After reviewing once again the contentions of the appellants in the light of the record, we reinstate the prior panel opinion.

AFFIRMED.

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*Senior District Judge of the Northern District of Ala., sitting by designation.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3370

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt,

INTERNATIONAL PAPER COMPANY,
HAMPTON LUMBER SALES COMPANY,
WHITE LUMBER SALES, INC.,
QUINAULT PACIFIC CORPORATION,
GOLD REY FOREST PRODUCTS, INC., and
W. KENT BISHOP, Petitioners,

versus

JOHN C. PENNINGTON, TRUSTEE
AETNA BUSINESS CREDIT, INC., and
FREEMAN & HAWKINS, Respondents.

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

[Filed December 28, 1979]

Before **GODBOLD, REAVLEY** and **ANDERSON,** Circuit Judges,

BY THE COURT:

IT IS ORDERED that petitioners' motion for rehearing is GRANTED and the prior unpublished panel opinion is hereby VACATED.

IT IS FURTHER ORDERED that this matter be placed upon the oral argument calendar.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3370
Summary Calendar*

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt

INTERNATIONAL PAPER COMPANY,
HAMPTON LUMBER SALES COMPANY,
WHITE LUMBER SALES, INC.,
QUINAULT PACIFIC CORPORATION,
GOLD REY FOREST PRODUCTS, INC., and
W. KENT BISHOP, Plaintiff's[sic]-Appellants

versus

JOHN C. PENNINGTON, TRUSTEE
AETNA BUSINESS CREDIT, INC., and
FREEMAN & HAWKINS, Defendants[sic]-Appellees

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

(November 9, 1979)

Before **GODBOLD, REAVLEY** and **ANDERSON,** Circuit Judges,

PER CURIAM:

Appellants appeal from an order of the bankruptcy court awarding attorneys' fees against them and in favor of appellees. The award was based upon the bad faith, vexatiousness, and oppressive tactics of appellants in conducting needless and excessive litigation in the related case of *In re Georgia Paneling Supply, Inc.*, ___ F.2d ____ (5th Cir. 1979) [slip op. No. 79-1076]. The order was affirmed in all respects by the district court and this appeal followed.

The "bad faith" exception to the "American rule" that attorneys' fees may not otherwise be awarded to a party absent a statute, court rule or contract provision is not questioned. *F. D. Rich Co., Inc. v. United States,* 417 U.S.

116 (1974); *Hall v. Cole,* 412 U.S. 1 (1973); *Carter v. Noble,* 526 F.2d 677 (5th Cir. 1976). Rather, appellants contend that the award is improper because the bankruptcy judge engaged in judicial misconduct and the district court condoned this behavior. The bankruptcy judge's memorandum in support of the award is also attacked as "erroneous."

A careful examination of the record convinces us that appellants have failed to demonstrate judicial impropriety. Their brief does not accurately construe the record, and on more than one occasion conclusory allegations are made without reference to any supporting evidence.

The bankruptcy court spent almost twenty pages detailing the bad faith and vexatiousness involved in appellants' litigation, R. Vol.I, pp. 128-47, and the district court affirmed in all respects. Upon review, a judgment of the district court affirming the bankruptcy court's determination based on findings of fact will not be disturbed unless the findings are clearly erroneous. *Sears, Roebuck & Co. v. Boydston,* 520 F.2d 1098, 1100 (5th Cir. 1975); *Porterfield v. Gerstel,* 249 F.2d 634 (5th Cir. 1957). A review of the bankruptcy court's findings, appellants' "refutation" of those findings and the record convinces us that the findings are supported by the record and are not clearly erroneous.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

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*Fed. R. App. P. 34(a); 5th Cir. R. 18.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

GEORGIA PANELING SUPPLY, INC.

Bankruptcy Case No. B74-1628A

[Filed August 30, 1978]

ORDER

These bankruptcy proceedings are once more before the court on intervenors' appeal. Appellants herein challenge the June 7, 1978, order of the bankruptcy court assessing costs and legal expenses of previous motions and appeals against the intervenors. Appellants herein complain: (1) that the January 5, 1978, and December 20, 1977, opinion and order of the bankruptcy court are void; (2) that the bankruptcy court failed to conduct an evidentiary hearing as ordered by this court; (3) that the January 5, 1978 opinion of the bankruptcy court is erroneous; and (4) that appellants were treated unfairly. Appellants' most vigorous complaint assails appellees' counsel's conferring inter se prior to filing response and preparing proposed findings of fact for the bankruptcy court's consideration.

The conduct challenged herein does not suggest reversal of the bankruptcy court's order. No harm is suffered when counsel confer prior to responding to a pending motion. The bankruptcy court's failure to request the submission of proposed findings of fact and conclusions of law from all parties was not exemplary, but neither was it clearly erroneous. The fact that although an evidentiary hearing was held, it did not suit appellants' convenience or interests does not imply disregard of this court's order. Appellants' grounds for appeal are therefore without merit.

Accordingly, for the reasons hereinabove expressed, the bankruptcy court's order of June 7, 1978, is hereby AFFIRMED.

IT IS SO ORDERED, this 29th day of August, 1978.

/s/ RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

GEORGIA PANELING SUPPLY, INC.

Bankruptcy Case No. 74-1628A

[Filed October 13, 1978]

ORDER

These bankruptcy proceedings are presently before the court on the motion of the intervenors International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Quinault Pacific Corporation, and White Lumber Sales, Inc. and of their attorney, W. Kent Bishop, [hereinafter the "movants"] seeking reconsideration of this court's order of August 29, 1978. Our August order affirmed the Bankruptcy Court's order entered June 7, 1978, assessing attorneys' fees and costs against the instant movants in favor of Aetna Business Credit, Inc., the Trustee, and his co-counsel.[1] The movants herein contend: (1) that this Court's affirmance was premature as the Bankruptcy Court had not yet entered the necessary findings of fact and conclusions of law; and (2) that the Bankruptcy Court's order was arbitrary, erroneous, and biased.

The court will GRANT the motion for reconsideration of our August 29, 1978, order as we recognize the confusion which has surrounded our order and the underlying bankruptcy ruling. The confusion resulted from the myriad overlapping appeals taken by the movants and from the Bankruptcy Court's three-month delay in furnishing findings of fact and conclusions of law to support the June 7, 1978 order. Upon reconsideration, however, the court once more AFFIRMS the Bankruptcy Court's decision to assess

[1] The bankruptcy Court determined that an award of $5,146.30 to Aetna, $7,440.00 to the trustee, and $23,745.00 to co-counsel to the trustee, was reasonable under the circumstances presented.

attorneys' fees and costs against the intervenors and their attorney, the instant movants.

The intervenors filed a notice of appeal of the subject bankruptcy order on June 16, 1978, within the ten days allowed by the bankruptcy rules. They filed a cost bond to cover the appeal and the action was duly submitted by the Clerk of Court for our review. Our affirmance based on the record of the proceedings was entered before the Bankruptcy Court supplied the necessary findings and conclusions. The movants now challenge the Bankruptcy Court's authority to enter findings and conclusions once notice of appeal has been filed. They contend that the subsequent entry of findings and conclusions is precluded as the Bankruptcy Court is divested of jurisdiction upon an appeal and that this preclusion inures to the benefit of the movants freeing them from the purported assessment.

Although the Bankruptcy Court is divested of jurisdiction over the order once appealed, it is not divested nor even relieved of the obligation to file supportive findings and conclusions. The obligation remains and findings and conclusions must be supplied. Bankruptcy Rule 752. Movants' attempt to salvage "salutary benefit" from the confusion is unavailing. The bankruptcy[sic] findings of fact and conclusions of law entered September 11, 1978, will be reviewed by the court in our reconsideration of the order awarding attorneys' fees and expenses.

Having accepted the challenged findings and conclusions, the court may then proceed to the movants' arguments assailing the fact and amount of the award. They complain: (1) that an award of attorneys' fees and costs should be deemed arbitrary and capricious because such penalty is unearned upon the record of these proceedings; and (2) that the amount assessed is erroneous because the movants have been charged for unrecoverable expenses alleged as (i) fees incurred in the plenary suit; (ii) fees incurred in responding to movants' constitutionally guaranteed right to protect their interests; (iii) fees incurred by both the trustee and his co-counsel for the same work; and (iv) fees incurred as a result of the Bankruptcy Court's violations of Canons of Judicial Conduct and counsel's violations of the Code of Professional Responsibility.

Upon the first complaint, the court concludes that an award of attorneys' fees and costs was neither arbitrary, abusive or discretion, nor clearly erroneous under the circumstances of these proceedings. The bankruptcy judge's findings recite the background of this litigation and then report the countless unnecessary challenges and appeals taken by the movants relative to their spurious Rule 60(b), Fed. R. Civ. P., petition. The movants' conduct was found at the close of a series of hearings before the bankruptcy judge to be vexatious and in bad faith. This finding is firmly supported on the record and may not be termed arbitrary nor abusive of discretion in light of the extraordinary circumstances of these proceedings. As the finding of movants' vexatious and oppressive conduct has been thoroughly documented by the bankruptcy judge, this court must AFFIRM an award of fees and costs. *See In re A. G. Love, Jr.*, 577 F.2d 344, 352 (5th Cir. 1978) [error for the district court to have set aside Bankruptcy Court's assessment of attorney's fees against a creditor who had prosecuted his claims in bad faith, vexatiously, wantonly, or for oppressive reasons.]

The second issue then is the amount of the award. The Bankruptcy Court has wide discretion in assessing a penalty amount. However, in order for the reviewing court to evaluate the exercise of discretion in light of movants' challenges, the Bankruptcy Court must enter specific findings to support the conclusion that the amounts claimed are reasonable. The reviewing court needs to know which hours are deemed reimbursable.[2] Although some of the factors for determining an attorney's fee award of *Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974) are not applicable when an award is imposed to penalize bad faith and vexatious conduct, a recitation of the Bankruptcy Court's consideration of the applicable criteria would be helpful to our review. Even though the amounts claimed by Aetna and the trustee stood unchallenged at the evidentiary hearing and even though the

[2] The court is unable to determine, for example, whether the Bankruptcy Court has awarded recovery of fees incurred on the bankruptcy and plenary actions or only on the bankruptcy proceedings.

hours claimed by co-counsel to the trustee were based on a stipulation of counsel,[3] this court requires a statement of findings in order to complete our review.

Accordingly, the court hereby (1) GRANTS the intervenors' motion for reconsideraton; (2) upon reconsideration again AFFIRMS the order of the Bankruptcy Court of June 7, 1978 assessing attorneys' fees and costs against the intervenors and their counsel; but (3) REMANDS the proceedings to the Bankruptcy Court for entry of findings of fact as to the hours expended and expenses incurred in support of the amount of the Bankruptcy Court's award.

IT IS SO ORDERED.

This, the 11th day of October, 1978.

/s/ RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

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[3] Although counsel stipulated to the hours expended, movants noted their challenge to a portion of those hours.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

GEORGIA PANELING SUPPLY, INC.

Bankruptcy Case No. B74-1628A

[Filed February 20, 1979]

ORDER

These bankruptcy proceedings are presently before the court on the findings of fact and conclusions of law as to an attorneys' fee award entered by the Bankruptcy Court upon our previous remand of the action, Order entered October 11, 1978. The proceedings are also before the court on the intervenors' "Suggestion" and "Amendment to Suggestion," which argue that this court lacked jurisdiction to review intervenors' motion for reconsideration.

The court has reviewed and is in agreement with the Bankruptcy Court's findings of fact regarding the attorneys' hours and expenses and the amount of the award. The court rejects the intervenors' "suggestion." *See Lairsey v. Advance Abrasives Co.*, 542 F.2d 928 (5th Cir. 1976). Our order of October 11, 1978, granted the intervenors' motion for reconsideration and affirmed the Bankruptcy Court's findings of fact and conclusions of law entered September 11, 1978 in support of an earlier order. Our October entry was an attempt to bring clarity to the

> confusion [which had] resulted from the myraid overlapping appeals taken by the movants and from the Bankruptcy Court's three-month delay in furnishing findings of fact and conclusions of law to support the June 7, 1978 order.

Order entered October 11, 1978, at 1. Our entry, an attempted aid to any further appellate review, was within this court's jurisdiction. *See Lairsey v. Advance Abrasive Co.*, 542 F.2d 928 (5th Cir. 1976).

Accordingly, the court hereby: AFFIRMS the findings of fact and conclusions of law entered by the Bankruptcy

Court on November 14, 1978, regarding the attorneys' fee award and DENIES the intervenors' "suggestion" that this court lacked jurisdiction to review the previous motion for reconsideration.

IT IS SO ORDERED.

This, the 16th day of February, 1979.

/s/ RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of

GEORGIA PANELING SUPPLY, INC., Bankrupt

Case Number B74-1628A in Bankruptcy

[Filed September 8, 1977]

ORDER AND NOTICE OF ASSIGNMENT OF HEARING

NOTICE IS HEREBY GIVEN that the hearing on Appellant's Remanded Motion under Rule 60(b) and Application of Aetna Business Credit for Assessment of Expenses Against Appellants in the above-named case shall be before the undersigned in Room 546, U.S. Courthouse, 56 Forsyth Street, NW, Atlanta, Georgia, at 8:00 A.M., on the 19th day of September, 1977.

At Atlanta, Georgia, this 8th day of September, 1977.

/s/ WILLIAM L. NORTON, JR.
U.S. BANKRUPTCY JUDGE

cc: W. Kent Bishop
John Pennington
Douglas Cronkright
C. Edward Dobbs

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

GEORGIA PANELING SUPPLY, INC., Bankrupt

Case No. B74-1628A

[Filed September 12, 1977]

ORDER

The Motion of the Trustee, John C. Pennington, for an assessment of expenses incurred on appeal having been read and considered, it is hereby

ORDERED that International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Versapanel, Inc., and White Lumber Sales, Inc., be and appear before this Court at 8:00 a.m., on September 19, 1977, in Room 546 of the United States Courthouse, 56 Forsyth Street, Atlanta, Georgia 30303, and then and there show cause, if any there be, why the relief prayed for in said Motion should not be granted.

IT IS ORDERED, this 12th day of September, 1977.

/s/ WILLIAM L. NORTON, JR.
U.S. BANKRUPTCY JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:

GEORGIA PANELING SUPPLY, INC., Bankrupt

Case No. B74-1628A

[Filed September 16, 1977]

ORDER

Certain creditors of the referenced Bankrupt, International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc. Versapanel, Inc., and White Lumber Sales, Inc., appealed from the Order of this Bankruptcy Court entered on June 17, 1976, approving the settlement by the Trustee of a controversy with Aetna Business Credit, Inc. After affirmance of said Order in all respects by the District Court sitting on appeal, the objecting Creditors filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure and the District Court by its Order entered on July 22, 1977[sic], remanded the objecting Creditors' Rule 60(b) Motion to this Court for a hearing and determination of the issues presented.

On September 8, 1977, this Court entered an Order setting the matter for hearing at 8:00 a.m. on the 19th day of September, 1977. On September 12, 1977, the objecting Creditors filed an Application with this Court requesting that the time and date set for hearing be postponed until a date on or after October 24, 1977, for the following cited reasons: (1) Counsel for the objecting Creditors would be otherwise engaged in a jury trial before the Honorable Albert J. Henderson, Jr., District Court Judge of this District; (2) that a determination need first be made by this Court as to the adequacy or competence of the Trustee to conduct the defense, presumably in his own behalf, and as to whether Aetna Business Credit, Inc. is a proper party to this proceeding; and (3) that an order need first be entered by this Court incorporating all of the discovery documents in certain related plenary actions into these

proceedings in bankruptcy on the Creditors' Rule 60(b) Motion.

The Trustee, by his response to the Creditors' Application, has shown by the affidavits of counsel that certain criminal matters and jury trial in a civil action are set to be tried before Judge Henderson during the week of September 19, 1977, prior to the trial of the matter in which counsel for the objecting Creditors in involved. It therefor[sic] appearing that said case involving counsel for Creditors will not be reached by Judge Henderson during the time set by this Court for hearing of Creditors' Rule 60(b) Motion, Creditors' Application for continuation and postponement for the reason of the conflict anticipated by counsel for Creditors is hereby DENIED.

This Court does not perceive a logical nexus between a determination as to the Trustee's adequacy or competence to conduct his own defense, and the question of whether Aetna Business Credit, Inc. is a proper or interested party to be heard in these proceedings. It appears sufficient that Aetna Business Credit, Inc. has participated in the matter before this Court from the time of the original hearing on the Trustee's Application to settle his controversy. Further, as a party to the settlement which is the subject of this proceeding, Aetna Business Credit, Inc. would appear to have real and obvious interest in the outcome.

Accordingly, whether by right or by reason of the discretion vested in this Court to hear those who would be directly affected by its decisions, Aetna Business Credit, Inc. will not be denied a voice in this matter if it so desires. It therefor[sic] appearing that Creditors' Application for postponement for the reason that the Trustee has not been shown to be inadequate or incompetent with the result that Aetna Business Credit would be then not a party, is without merit or logic, their request for such reason is hereby DENIED.

Judge Freeman's Order of remand directed this Court to the question of whether Appellants can carry their heavy burden of demonstrating grounds for relief under Rule 60(b)(1), (2) or (3) which would warrant setting aside the earlier judgment of this Court. The cited portion of Rule 60(b) states the following reasons for providing relief from a final judgment: (1) mistake, inadvertence, surprise, or

excusable neglect; (2) newly discovered evidence, which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party.

Since evidence supporting the grounds for relief stated under (1) and (3) of Rule 60(b) would not likely appear in the discovery documents in the related plenary actions, this Court sees no need to consider these provisions of the rule in the context of the Creditors' request for postponement based on the need for an order incorporating such discovery records into these proceedings.

The character of the evidence which must be offered in order to support a claim for relief under (2) of Rule 60(b) as stated in Professor Moore's Treatise,

> ". . . . must be such as was not and could not by the exercise of due diligence have been discovered in time to present in the original proceeding. And must be admissible and credible, and must be of such a material and controlling nature as will probably change the outcome, not merely cumulative or tending to impeach or contradict a witness." 7 *Moore's Federal Practice*, Sec. 60.23[4].

It seems highly improbable to this Court that all of the discovery documents in the various related plenary actions would be admissible under the suggested criteria, or further the Creditors' effort to carry their heavy burden of demonstrating grounds for relief. It will be incumbent on the Creditors to select and offer only evidence of such a character as will meet the cited standard for "newly discovered evidence". This Court should not be put upon or required to examine or sift through a large body of discovery documents in order to determine that which might support the Creditors' contentions. This would be the case whether such purported evidence were offered *en masse*, or introduced by the Creditors in a random fashion for the purpose of determining which of such evidence might be admissible on the narrow issues before this Court.

Accordingly, since this Court views it to be the burden of the movants to produce only evidence such as would be admissible in the context of their motion, and the sum-

mary nature of the proceeding from which it stems, it perceives no reason why an order should issue incorporating quantities of discovery documents which could only tend to burden the Court and hamper an efficient and just determination of the issues.

Therefore, Creditors' Application for Postponement for the reason that an order needs to first be entered incorporating all of the discovery documents in the related plenary actions is hereby DENIED.

Counsel for Creditors suggests that the hearing on their Rule 60(b) Motion will require two to three weeks. This Court fails to comprehend how it will require such an amount of time to show this Court what the Creditors have discovered since the original hearing on May 18, 1976, which by due diligence was not discoverable before said date and which would require a different ruling with respect to the propriety of the Trustee's settlement of its controversy with Aetna Business Credit, Inc.

Creditors' request for reservation by this Court of a two to three week period for the hearing of their Rule 60(b) Motion is therefor hereby DENIED.

On Monday, September 19, 1977, the Court will confine its examination exclusively to evidence offered by the Creditors which is of a character appropriate to a Rule 60(b) Motion, and as to new evidence, that which necessarily could not have been discoverable prior to the hearing on May 18, 1976.

IT IS SO ORDERED, this 16th day of September, 1977.

/s/ WILLIAM L. NORTON, JR.
UNITED STATES BANKRUPTCY JUDGE
UNITED STATES DISTRICT COURT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt

In Bankruptcy No. B74-1628A

[Filed September 23, 1977]

ORDER

At the hearing before this Bankruptcy Court on September 19, 1977, on the objecting creditors' Rule 60(b) motion remanded to this Court for hearing by Order of United States District Court Judge Richard C. Freeman, John C. Pennington, duly appointed Trustee for the captioned Bankrupt, on oral motion requested this Court to consider amendment of its Order of September 16, 1977, and the objecting creditors placed before this Court three written motions for consideration, being: (1) Notice of Appeal and Request for Immediate Review; (2) Motion for a Stay Pending Appeal; and (3) Motion to Reassign Case.

After hearing oral argument by counsel for the parties, the Court rule:

Trustee's Motion to Amend Order of September 16, 1978

In accord with its intention announced to the parties on September 16, 1977, to clarify its Order of that same date,

IT IS ORDERED that the last three lines of the last full paragraph preceding the date be amended to read as follows:

> ". . . Motion, and as to 'newly discovered evidence' under Rule 60(b)(2), that which necessarily could not have been discovered by due diligence in time to move for a new trial under Rule 59(b), or a rehearing under Bankruptcy Rule 923."

Notice of Appeal and Request for Immediate Review

The objecting creditors' Notice of Appeal and Request for Immediate Review was brought to the attention of this

Court to indicate its filing and to provide the basis for the objecting creditors' motion, which next follows.

Motion for a Stay Pending Appeal

The parties being present with witnesses and ready to proceed, the objecting creditors' motion under Rule 805 of the Rules of Bankruptcy Procedure was DENIED, it appearing that such denial would best serve to protect the rights of all parties in interest, the objecting creditors'[sic] having been advised by this Court that they will be afforded such time or periods of time as may be necessary to permit a full hearing or evidentiary matters which are admissible and appropriate in the consideration of a Rule 60(b) motion.

Motion to Reassign Case

For the reasons appearing in the foregoing denial of the objecting creditors' motion under Bankruptcy Rule 805, and it further appearing that this Court has heard evidence and arguments of counsel for a period of at least five hours, with additional time for hearing being presently set, this Court would DENY objecting creditors' motion to reassign the case. Moreover, this Court is subject to the United States District Court's Order of remand, dated August 26, 1977, and is without authority under Rule 102 of the Bankruptcy Rules of Procedure to reassign the case.

SO ORDERED this 19th day of September, 1977.

/s/ WILLIAM L. NORTON, JR.
U.S. BANKRUPTCY JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt

Bankruptcy Case No. B74-1628A

[Filed February 28, 1978]

ORDER

This matter came on for hearing on February 28, 1978, upon the Application of Appellants International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Versapanel, Inc. and White Lumber Sales, Inc. for leave to take the depositions of John C. Pennington (the Trustee herein), Douglas L. Cronkright (the Trustee's attorney of record), C. Edward Dobbs (co-counsel of record to Aetna Business Credit, Inc.), R. William Ide, III (co-counsel of record for Aetna Business Credit, Inc.), and John E. Sawhill (past counsel of record to the Trustee) in connection with the Applications for assessment of legal expenses filed herein by Aetna and the Trustee, and upon the Response of Aetna Business Credit, Inc. to said Application of Appellants; and the Court having heard argument of counsel for Appellants in support of said Application and argument of counsel of Aetna and the Trustee in opposition thereto; it is hereby

ORDERED that Appellants' Application is hereby granted to the extent that it requests leave to take the depositions of John C. Pennington, Douglas L. Cronkright, C. Edward Dobbs, and R. William Ide, III, at the offices of Appellants' counsel on or before March 3, 1978; and it is further

ORDERED that Appellants' Application is hereby denied to the extent that it requests leave to take the depositon of John E. Sawhill, inasmuch as no legal expenses are sought herein by John E. Sawhill nor are any legal expenses sought herein for time expended by John E. Sawhill in connection with services rendered on behalf of the Trustee; and it is further

ORDERED that the scope of the examination conducted of John C. Pennington, Douglas L. Cronkright, C. Edward Dobbs and R. William Ide, III, shall be limited exclusively to the following:

(1) The amount and origin of the costs incurred by Aetna, the Trustee and the Trustee's counsel for which they seek recovery herein;

(2) The amount of time expended by C. Edward Dobbs and R. William Ide, III, in connection with their representation of Aetna for which they billed Aetna and for which Aetna seeks recovery herein;

(3) The amount of time expended by Douglas L. Cronkright and John C. Pennington in connection with their participation in this bankruptcy case and for which they seek recovery herein;

(4) The hourly or other billing rates charged by said deponents at the time that said services were rendered by them; and

(5) Such other matters which may be contained in any affidavits or exhibits thereto filed by said deponents and which are directly related to the amount of legal expenses sought herein or the method of computing such expenses; and it is further

ORDERED that any testimony given by C. Edward Dobbs or R. William Ide, III shall not be deemed to be a waiver of the attorney/client privilege of Aetna in this or in any other legal proceeding.

SO ORDERED, this 28th day of Feburary, 1978.

/s/ WILLIAM L. NORTON, JR.
UNITED STATES BANKRUPTCY JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt

Bankruptcy Case No. B74-1628A

[Filed June 7, 1978]

ORDER

For the reasons set forth in the Findings of Fact and Conclusions of Law and Opinion to be filed at a later date, it is hereby

ORDERED that the Application of Aetna Business Credit, Inc. ("Aetna") for Assessment of Legal Expenses Incurred on Appeal and the Application of Aetna for Assessment of Expenses Incurred by It in Connection with Appellants' Rule 60(b) Motion be, and the same hereby are granted, and International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Versapanel, Inc., and White Lumber Sales, Inc. (hereinafter collectively referred to as "Appellants") are hereby ordered to pay to Aetna the sum of $5,146.30 within twelve (12) days of the date of the entry of the Opinion of the Court in support of this Order; and it is further

ORDERED that the Motion of the Trustee and his counsel for Assessment of Expenses Incurred on Appeal and Motions Filed in Connection Therewith be, and the same hereby is, granted, and Appellants are hereby ordered to pay to John C. Pennington the sum of $7,440.00 and to the law firm of Freeman & Hawkins the sum of $23,745.00 within twelve (12) days of the date of the entry of the Opinion of the Court in support of this Order; and it is further

ORDERED that counsel for Appellants herein, W. Kent Bishop, shall be jointly and severally liable to Aetna, the Trustee and the law firm of Freeman & Hawkins for the respective sums ordered to be paid to each of them by Appellants as set forth hereinabove; and it is further

ORDERED that all costs of the proceedings held in connection with said Application and Motion be, and they are hereby, assessed against Appellants; and it is further

ORDERED that the time for filing a notice of appeal from this order shall begin to run from the date that an opinion containing findings of fact and conclusions of law is entered in support of this order.

SO ORDERED in Atlanta, Georgia, this 6th day of June, 1978.

/s/ WILLIAM L. NORTON, JR.
U.S. BANKRUPTCY JUDGE
UNITED STATES DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt

Case No. B74-1628A

[Filed September 11, 1978]

MEMORANDUM

This matter came on for hearing beginning on Feburary 14, 1978, on applications filed by Aetna Business Credit, Inc. ("Aetna") and by the Trustee herein and his attorneys praying for an assessment against International Paper Company, Hampton Lumber Sales Company, White Lumber Company, Inc., Versapanel, Inc. and Gold Rey Forest Products, Inc. (hereinafter collectively referred to as "Appellants") of legal expenses incurred by the applicants in connection with Appellants' appeal from this Court's order of June 17, 1976, and Appellants' Rule 60(b) motion. The hearing was continued on March 6th, March 8th, April 5th, April 6th, and May 2, at which times the Court received evidence as to the amount of legal expenses claimed and incurred by the applicants.

After having reviewed all matters before it, and having heard argument of all counsel concerning said applications and evidence presented in connection therewith, and based upon its review of the extensive record of this case, the Court has heretofore on June 7, 1978, entered a final order granting said applications in the amounts set forth in said order. In the order of June 7, 1978, the Court announced that findings of fact and conclusions of law would follow at a later date, from which date the time of appeal would continue. Appellants, however, saw fit to appeal from the Court's order prior to the entry of these findings of fact and conclusions of law, and the District Court has recently affirmed this Court's order on appeal. Notwithstanding such affirmance, this Court will set forth the reasons that compelled it to arrive at the result that it did in the June 7

order. Accordingly, the Court now sets forth the findings of fact and conclusions of law in connection with said order.

To the extent that any of the following findings of fact constitute conclusions of law, they are adopted as such, and to the extent that any of the conclusions of law constitute findings of fact, they are likewise adopted as such.

Background

The instant applications seek to have assessed against Appellants the legal expenses incurred by the Trustee, his counsel and Aetna, which resulted from Appellants' appeal from this Court's order of June 17, 1976, approving the Trustee's settlement of a lawsuit against Aetna and which resulted from Appellants' Rule 60(b) motion seeking to set aside the settlement on various asserted grounds.

Since the initiation of this bankruptcy case in July[sic] of 1974, almost four years ago, and the institution of the Trustee's lawsuit in District Court in July of 1975, some three years ago, some 26 depositions have been taken in this proceeding and in the Trustee's action, consisting of more than 4,000 pages of transcript, to which in excess of 600 documents have been attached, all of which has required more than 145 separate docket entries. Many lengthy motions and briefs have been filed in this case by Appellants, each of which are[sic] directed at the Trustee's settlement and this Court's approval of that settlement in June of 1976, which is now final and unappealable.

What follows is a brief overview of the history of the tortured, prolix, sad, and unfortunate litigation in this bankruptcy case.

(1) In June of 1974, Aetna Business Credit, Inc. ("Aetna") and the C & S Bank of North Fulton ("C & S") foreclosed security interests upon certain property of Georgia Paneling Supply, Inc. ("the Bankrupt").

(2) On July 29, 1974, the Bankrupt was adjudicated a bankrupt upon an involuntary petition filed by three of the Appellants on June 24, 1974, which was subsequently consented to by the Bankrupt on the date of adjudication.

(3) On September 10, 1974, John C. Pennington was nominated by Appellants, elected by vote of the creditors,

appointed by the Court and duly qualified as Trustee of the bankrupt estate, which was on the date of his appointment and is now without any assets.

(4) Subsequent to the Bankrupt's adjudication, one of the Appellants — Hampton Lumber Sales Company — filed a civil action in the U.S. District Court for this District against Aetna alleging that Aetna had converted lumber sold by Hampton to the Bankrupt when Aetna foreclosed upon the Bankrupt's inventory of which Hampton's unpaid for lumber was allegedly a part. Hampton's counsel in this civil action also represents Appellants herein.

(5) In early 1975, Walter E. Heller & Company (Inc.) filed a civil action in the U.S. District Court for this District against Aetna which similarly alleged that Aetna had converted lumber sold to the Bankrupt, for which payment had not been made to Heller, when Aetna foreclosed upon the Bankrupt's inventory of which that lumber was allegedly a part. Heller's counsel in this civil action, which has been dismissed by Heller, was the same counsel who now represents Hampton and Appellants.

(6) Appellants' counsel approached the Trustee sometime prior to July of 1975, advised the Trustee of the pendency of the Hampton and Heller lawsuits and the allegations therein, and requested the Trustee to appoint Appellants' counsel as counsel to the Trustee in order to pursue claims against Aetna and C & S for alleged voidable preferences and fraudulent conveyances. The Trustee declined this request. Instead, with the approval of the Court, the Trustee retained his existing legal counsel in order to independently review said claims and allegations of Appellants' counsel.

(7) On July 9, 1975, at the urging and with the assistance of Appellants and their counsel, the Trustee filed a civil action in the U.S. District Court for this District against both Aetna and C & S to recover alleged voidable preferences and fraudulent conveyances received by them in connection with their foreclosure on the Bankrupt in June of 1974.

(8) On January 20, 1976, after having conducted discovery and investigation of the facts, including investigation by a private investigator, the Trustee concluded that said

lawsuit had little or no merit and made application to this Court to settle his lawsuit with respect to Aetna pursuant to Section 27 of the Bankruptcy Act. At an in-chambers hearing held that same day, Appellants appeared in opposition to the settlement proposed and thereafter moved to intervene in the Trustee's lawsuit, which was then pending before the United States District Court.

(9) On April 16, 1976, the Trustee renewed his application to settle with Aetna, and on May 5, 1976, Appellants filed an application to remove the Trustee for alleged dereliction of his fiduciary duties in attempting to effectuate a settlement upon terms opposed by them. In addition, Appellants filed an application requesting the Court to appoint a named successor trustee with Appellants' counsel to serve as such successor trustee's attorney.

(10) A hearing on the Trustee's application, as well as on the two applications filed by Appellants, was held on May 18, 1976. Counsel for Appellants brought the proposed successor trustee to attend the hearing. Appellants argued that the settlement should not be approved because Aetna had allegedly defrauded them and converted their lumber during the June, 1974 foreclosure. After lengthy argument of counsel for the Trustee, Aetna and Appellants, the Court entered an order on June 17, 1976, which granted the Trustee's application and denied those filed by Appellants. This Court's order was based primarily on the grounds that the Trustee did not have standing to pursue claims for injury to Appellants allegedly resulting from asserted wrongdoings of Aetna and that the Trustee's preference claim against Aetna stood little chance of success on the merits.

(11) From the order of this Bankruptcy Court, Appellants appealed on June 29, 1976, to the District Court, which affirmed in all respects this Court's rulings by order of April 15, 1977.

(12) On May 16, 1977, the last day on which Appellants could appeal from the District Court's affirmance, Appellants filed a motion requesting the District Court to extend the time within which they might file a notice of appeal. The District Court denied Appellant's motion to extend time on June 15, 1977, the time for appeal having by then run.

(13) On May 31, 1977, Appellants filed with the District Court a motion under Rule 60(b) of the Federal Rules of Civil Procedure wherein they requested the District Court to set aside its affirmance of this Court's order approving the settlement between the Trustee and Aetna. Thereafter, Appellants filed four amendments to their Motion, the third of which consisted solely of a photocopy of their original motion with handwritten notations interspersed throughout which gave citations to various depositions. In addition, Appellants filed in support of their motion a request to submit additional affidavits, which the District Court on July 22, 1977, denied as being in direct contravention of a verbal order to Appellants' counsel to refrain from filing further pleadings.

(14) On June 13, 1977, this Court entered an order assessing $131.50 as the cost of the transcript on appeal against Appellants, from which order Appellants appealed to the District Court.

(15) On July 22, 1977, the District Court denied Appellants' Rule 60(b) motion as untimely filed.

(16) Following the denial of their motion under Rule 60(b), Appellants filed a second Rule 60(b) motion wherein they requested the District Court to vacate its denial of the instant Motion because the District Court had entered its order under a misapprehension of the facts relating to Appellants' timeliness. On August 25, 1977, the District Court, as the appellate court, entered an order upon Appellants' second Rule 60(b) motion vacating its denial of the instant Motion and remanding the same to this trial court for consideration of the matter by this Bankruptcy Court under subparagraphs (1), (2) and (3) of Rule 60(b).

(17) Following almost two full days of lengthy hearings, this Court on December 20, 1977, entered an order denying Appellants' remanded Rule 60(b) motion for the reasons set forth in an Opinion filed on January 5, 1978.

(18) On December 28, 1977, the District Court affirmed this Court's assessment against Appellants of $131.50 as costs of the appeal. Appellants thereafter petitioned for an allowance of appeal to the Fifth Circuit Court of Appeals, which on March 7, 1978, denied their petition. Notwithstanding that denial, Appellants filed a notice of appeal

from the same order, which appeal, upon motion of Aetna, was again dismissed by the Fifth Circuit.

(19) On February 14, 1978, the Court heard the instant applications of Aetna and the Trustee for assessment of costs of their protracted litigation.

(20) Subsequent to the hearing held on February 14, 1978, upon the instant applications, Appellants with leave of Court took the depositions of Aetna's counsel, the Trustee's counsel and the Trustee concerning the amount of legal expenses sought by them herein.

(21) The hearing on the instant applications was continued on March 6, March 8, April 5 and April 6.

(22) At the request of the Court to conserve judicial time, the Trustee's co-counsel, Freeman and Hawkins, have entered into a written stipulation concerning the time and efforts expended by such co-counsel in matters for which fees by such co-counsel are requested herein.

Findings of Fact and Conclusions of Law

(1) On May 5, 1976, Appellants filed an objection to the settlement application of the Trustee and an application to remove the Trustee on account of his settlement proposal. Prior to that time, Appellants had filed proofs of claim in this case.

Notwithstanding Appellants substantial involvement and participation in this bankruptcy case, Appellants claimed at page 12 of their Statement of Issues on appeal from this Court's June 17th order that they never consented to this Court's jurisdiction, which they denominate as "summary" jurisdiction.

Apart from the fact that Appellants' arguments miscon-

strued the concept of summary jurisdiction,* their statement was clearly wrong and asserted contrary to well-settled principles of bankruptcy jurisprudence. *See* Bankruptcy Rule 915.

(2) On page 10 of their supporting brief on appeal, Appellants argued that the District Court's order of September 30, 1976, granting them intervention in the Trustee's lawsuit was *res judicata* and required a reversal of this Court's settlement order on the grounds that the District Court had found that a settlement for $350.00 was inadequate.

Appellants clearly misrepresented the intent, purpose and holding of the District Court order. Nowhere did the District Court state that $350.00 was an improper figure for settlement purposes, and, in fact, the District Court affirmed the settlement for that amount.

(3) On page 13 of the same brief, Appellants claimed that the District Court intervention order of September 30th "adjudicated and held" that the Trustee's representation *was* inadequate.

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*Frequently, and unfortunately, the jurisdiction of the Bankruptcy Court is referred to as "summary jurisdiction." *Triester, What's In a Name - The Unhappy Tag of Summary Jurisdiction*, 39 Ref. J. 67 (1965). Whatever jurisdiction the Bankruptcy Court has over subject matter is "summary jurisdiction." *Triester, supra*. The court may exercise other jurisdiction, frequently called "plenary" jurisdiction, only by consent. Proceedings commenced by petition, application, motion, supported by affidavits, and orders to show cause have been called "summary"; while proceedings having all of the formality of the Federal Rules of Civil Procedure have been called "plenary." Nevertheless, in each instance, due process is required. *Central Republican Bank & Trust Co. v. Caldwell*, 68 F2d 721 (8th Cir.); *Collier, supra*, Sec. 23.02, ff. 5 and 6, p.439, f. 10, Due Process, f. 13. The confusing term, "summary jurisdiction," refers to the exclusive nature, not to the quality of the trial or hearing in the Bankruptcy Court. The quality and nature of the judicial inquiry and the depth of consideration given to the rights of the parties, be it plenary or summary, is and should be indistinguishable."Summary" properly refers to the immediacy and promptness of the hearing and consideration given to the dispute. Although the Bankruptcy Rules and the thrust of the Bankruptcy Act demand a quicker hearing and consideration that under normal civil litigation, (*Collier, supra*, Sec. 3.01[3]), with the enactment of the Bankrutpcy Rules in close conformity to FRCP, the "summary" label seems inappropriate.

See also In the Matter of Himoff Maritime Enterprises Ltd., (BC SDNY, May 5, 1977) 3 Bankr. Ct. Dec. 376, 13 CBC 316, fn. 2, suggesting most appropriately that the terms "exclusive or preemptive" are descriptions which come "closer to the mark" than the confusing adjective "summary."

Appellants clearly misstated the holding of that order, which, in fact, stated that "We need not and do not find that the Trustee's representation is inadequate." Also, it should be pointed out that the District Court ultimately affirmed this Court's denial of Appellants' application to remove the Trustee.

(4) On page 23 of the same brief, Appellants claimed that Aetna never raised the defense of standing in the Trustee's lawsuit.

In fact, contrary to such representation, the second defense of Aetna's answer to the Trustee's Complaint clearly states "Plaintiff has no standing to litigate the issues raised in his complaint."

(5) At various pages throughout their brief on appeal, Appellants represented that the District Court's September 30th order held that they were entitled to assert causes of action assertable only by a Trustee in bankruptcy under sections 60, 67 and 70 of the Bankruptcy Act.

A cursory review of that order readily discloses that the District Court merely noted that Appellants were *attempting* to assert "derivative" claims and did not determine whether they were *entitled* to sue upon causes of action arising under the aforecited sections of the Act. The Fifth Circuit's decision in the *Florida Trailer* case, cited by this Court in its order approving the settlement and in the District Court's affirmance of that approval, states unequivocally that unsecured creditors have no standing or authority to sue under those sections.

(6) On page 17 of their reply brief, Appellants represented that the "unanimous expression" in this case was that unsecured creditors were dissatisfied with the Trustee.

In fact, only these five Appellants, along with two others who once numbered among their ranks, have ever expressed any dissatisfaction with the Trustee. The vast majority of creditors have not participated actively in this case.

(7) At page 11 of their brief, Appellants cite the case of *Palakiki v. Territory of Hawaii,* 188 F.2d 54 (9th Cir. 1951), which was decided before Hawaii became a state of the Union, for the proposition that their Seventh Amendment right to jury trial was abridged in a Section 27 bankruptcy settlement hearing conducted without a jury. The *Palakiki*

case, however, involved a defendant convicted of murder/rape who contended that his confession was extracted in violation of the Fifth and Fourteenth amendments. Appellants' counsel confessed that he had not read the case and that the fault, if any, was that of his "law clerk".

(8) Throughout their brief on appeal, Appellants asserted that they were by law entitled to a full evidentiary hearing at the Section 27 settlement hearing.

The *Florida Trailer* case, and other cases, can not be clearer in holding that a trial on the merits in such cases is not required and that holding a full trial would frustrate the Congressional policy embodied in Section 27:

> "This policy favoring compromise could hardly be achieved if the test on hearing for approval meant establishing success or failure to a certainty. Parties would be hesitant to explore the likelihood of settlement apprehensive as they would then be that the application for approval necessarily result in a judicial determination that there was no escape from a liability or no hope of recovery and hence no basis for a compromise . . . *Obviously it would not be a settlement if to obtain approval the Trustee would have to demonstrate that he could not succeed had the preference claim been pressed* . . . Even conceding that on an adversary trial of the merits of the claim for preference . . . a court might have arrived at the conclusion that this resulted in . . . a consequent preference, the Referee* certainly did not abuse his discretion in evaluating the uncertainties of litigation by concluding that a settlement on these terms was a prudent thing . . . . There it ends. And there it must end unless, as cannot be the case, any objecting creditor is empowered to frustrate the Congressional policy encouraging

*Now "bankruptcy judge" under Bankruptcy Rules 901(7) and 902(4). See Report, Committee on the Judiciary, House of Representatives, Bkcy Law Revision, No. 95-595, 95th Congress, 1st Sess., to accompany HR8200, Sept. 8, 1977, page 7 & fn 4. See also Report of the Subcommittee on Civil & Constitutional Rights of the Committee on the Judiciary, House of Representatives, No. 13, Committee Print, 95th Cong., 2nd Sess, January 1978, Page 1, Bkcy Courts, the Current System.

> compromises by the trustees merely by showing on the hearing for approval that if the claim thus released were properly asserted, the estate would likely win." (Emphasis added).

Florida[sic] at 571 & 573; *accord, In re Blair,* 538 F.2d 849 (9th Cir. 1976) (rejecting contention of objecting creditor that there must be a "mini-trial" on the merits of claims sought to be compromise under Section 27); *Mathewson v. Mathewson,* 311 F.2d 833 (3d Cir. 1963); *Conneticut R. & Lighting Co. v. New York, N.H. & H.R. Co.,* 190 F.2d 305 (2d Cir. 1951); *In re California Associated Products Co.,* 183 F.2d 946 (9th Cir. 1950); *In re Prudence Co.,* 98 F.2d 559 (2d Cir. 1938); *In re Riggi Bros. Co.,* 42 F.2d 1974 (2d Cir. 1930), *cert. denied* 282 U.S. 881; *In re Black Watch Farms, Inc.,* 373 F. Supp. 711 (S.D.N.Y. 1974).

(9) Following the District Court's affirmance of this Court's June 17th order approving the settlement between the Trustee and Aetna, Appellants on May 16, 1977, filed a "motion to extend the time for filing a notice of appeal (or petition or allowance of appeal) for a period of thirty days." Appellants asserted three grounds for the motion: "excusable neglect"; "misconduct by an adverse party"; and the interests to be served by a "just, speedy and inexpensive determination of the issues involved". As to the first two grounds, Appellants attached in support of their motion an affidavit of their counsel. As to the third ground, Appellants claimed that if the District Court granted the motion, then their "impending motion under Rule 60(b) to set aside" the District Court's affirmance of this Court's June 17th order could be heard and "if meritorious" would "avoid an appeal" and "a second trial."

Thereafter, on or about May 31, 1977, Appellants filed their Rule 60(b) motion wherein they requested in part that the District Court vacate its affirmance until a hearing could be had on their Rule 60(b) motion in order to obviate the necessity for a "protective appeal". The District Court on June 15, 1977, entered an order denying Appellants' first motion for an extension of time within which to file their appeal.

The Court believes that Appellants improperly used the process and procedures of the federal rules to obtain a result clearly not contemplated or permitted by such rules.

As the District Court observed in its order of June 15th, Appellants utterly failed to allege any grounds to warrant such an extension, and, in this Court's view, their motion was frivolous. Furthermore, as Appellants themselves admitted, their Rule 60(b) motion was filed as a substitute for an appeal, a dilatory tactic which is not permitted by the Rules. *See* 7 *Moore's Federal Practice*, Par. 60.18[8] and Par. 60.28[2].

(10) As previously mentioned herein, Appellants appealed to the District Court from this Court's assessment against them of $131.50 as the costs of the transcription appeal taken from the Court's order of June 17th approving the settlement. Following a dismissal of their untimely appeal by the District Court, Appellants petitioned for an allowance of appeal to the Fifth Circuit Court of Appeals. The Appeals Court denied their petition, but Appellants nonetheless proceeded to file a notice of appeal to the Appeals Court. This appeal likewise was dismissed upon motion by Aetna.

The Court finds that such appeals to the Fifth Circuit were frivolous and without merit, and caused unnecessary cost and expense to Aetna.

(11) Appellants and their counsel asserted in their Rule 60(b) Motion, without citation to supporting authority, that the loan documents executed by the Bankrupt were unenforceable because they were signed by an Aetna representative who was without authority to bind Aetna to the agreements.

Appellants admitted, however, that their only "evidence" that the Aetna representative did not have the requisite authority was his deposition testimony that he was unaware of any specific corporate resolution authorizing him to execute such loan documents on Aetna's behalf. Appellants have utterly failed to demonstrate that such authority did not, in fact, exist. More importantly, however, it is legally inconsequential whether such authority existed because Aetna has never once argued that the loan documents were unenforceable against it and therefore Aetna has ratified the acts of its agent in signing those documents. *See* Ga. Code Ann. Sec. 4-303; *Advance Mortgage Corp. v. Guaranty Title Ins. Co.*, 416 F.2d 451 (5th Cir.

1969). The Court finds this assertion of Appellants and their attorneys to be totally frivolous.

(12) Appellants and their counsel took the position that Aetna's act of taking possession of its collateral preparatory to foreclosure was wrongful because an officer of the Bankrupt did not have the corporate authority to surrender possession of the collateral. This position, which was advanced without any citation of authority as though the matter were legally well settled, is, in fact, frivolous and contrary to all authority in Georgia. The Georgia Code, Section 109A-9—503, expressly authorizes a secured party to take possession of its collateral as long as repossession can be accomplished without a breach of the peace. *See Thurmond v. Elliot Finance Company* 141 Ga. App. 574 (1977). *See also Thompson v. Ford Motor Credit Co.*, 550 F.2d 256 (5th Cir. 1977). Neither logic, nor the Uniform Commercial Code requires a secured creditor to first obtain a corporate resolution or other express approval as a condition precedent to the exercise of rights expressly and unequivocally conferred by Sec. 9—503 of the Code. In addition, the Court notes that the loan documents themselves, which expressly authorize Aetna to take possession of its collateral without notice, were approved by a corporate resolution from the Bankrupt, which operates to ratify these terms of repossession.

(13) Throughout the various briefs and papers constituting their Rule 60(b) motion, Appellants stated unequivocally and without reservation, in the face of overwhelming evidence to the contrary, that Aetna never made a "loan" to the Bankrupt.

For the reasons set forth fully in this Court's Opinion herein of January 5, 1978, which was affirmed on appeal by the District Court, this Court finds that Appellants' arguments are unsupported, frivolous, and misrepresent the facts. In addition, this Court notes that Appellants even averred in numerous paragraphs of their Third Amended Complaint in the Trustee's lawsuit, which was

filed by them *after* the filing of their Rule 60(b) motion, that Aetna made advances to the Bankrupt. Furthermore, as reflected on page 77 of the Transcript of the hearing on Appellants' remanded Rule 60(b) motion, Appellants' counsel represented that

> "Mr. Sponsler [of International Paper Company] is here to say that after he got the documents finally on April the 27th [1977], and he conferred with counsel and looked at the documents, he learned for the first time that the loan had been made to Georgia Paneling Company . . ."

On cross-examination by Aetna's counsel, however, Mr. Sponsler actually testified as follows:

"Q. Where did Georgia Paneling Supply get the money to buy your goods?
A. Well, from varying sources, I would suppose.
Q. What were those sources?
A. Well, from the sale of other products, from loans, credit received from banks . . .
Q. Loans from who, Mr. Sponsler?
A. I said I don't know. They could have been from Aetna. They could have been from C&S Bank . . . .
Q. It is fair to say, Mr. Sponsler, that from July of 1973 to June of 1974 you simply don't know where Georgia Paneling Supply got the money to buy supplies, do you?
A. *Well, I know in fact that they had loans from C&S Bank and they were being factored by Aetna Business Credit* . . . .
Q. Did you mean to say that Aetna was factoring Georgia Paneling Supply, the Bankrupt?
A. It was my opinion that they were. I could have been wrong in that opinion.
Q. You just simply don't know?
A. No."

See Transcript at pp. 131-33 (emphasis added).

At a later point in the hearing, Mr. Sponsler again stated on cross-examination as follows:

"Q. And my question to you is, was Aetna factoring the Bankrupt or not?
A. To the best of my knowledge, they were factoring Georgia Paneling Supply, Inc.
Q. And that's the Bankrupt, is it not?
A. That is right.
Q. By factoring you mean loaning money against receivables, do you not?
A. And inventory, yes.
Q. All right. And therefore making advances that are secured by inventory and accounts receivable?
A. Yes.
Q. And that's your understanding?
A. Yes.
Q. Always has been?
A. Right.
Q. You've seen nothing to change that understanding?
A. No.
Q. Neither in June of 1974 nor today.
A. No.

See Transcript at pp. 184-85.

Thus, it can be seen that Mr. Sponsler, far from proving that Aetna never made an advance to the Bankrupt, as claimed by Appellants, in fact testified that his understanding has always been that Aetna did finance the inventory and receivables of the Bankrupt. Mr. Sponsler's testimony at this hearing is in sharp contrast with his unequivocal and unqualified testimony by affidavit (attached to the Fourth Amendment to Appellants' Rule 60(b) motion) wherein he stated that the "loan" was made to a related company of the Bankrupt, Georgia Paneling Company, and not to the Bankrupt.

(14) Appellants asserted in their Rule 60(b) motion and at oral argument that they were not aware of the precise date of the fire at Georgia Paneling at Forest Park. The fire occurred on December 31, 1973, and Appellants claim that they assumed that the fire had taken place sometime in January. Thus, Appellants assert that the sudden revelation through discovery conducted after the settlement hearing that the fire occurred on the last day in December constituted newly-discovered evidence as did the fact that

Aetna allegedly received the insurance proceeds payable on account of the loss.

However, the record reveals that Appellants' counsel was present at a depositon of the Bankrupt's officers in September of 1974 where these matters were fully discussed. *See* Transcript (Vol. II) dated September 20, 1977 at p.229-231. In addition, one of the Appellants testified at the hearing on these applications that there was discussion among lumber companies concerning the fire on or about the date that it occurred. *See* Transcript dated April 5, 1978 at p. 179-80.

(15) Appellants claimed in their Rule 60(b) motion and at oral argument that the insurance proceeds payable on account of the Forest Park fire were turned over to Aetna. They further claimed that that portion of the insurance proceeds attributable to loss of equipment should not have been paid to Aetna and that Aetna should have turned that money over to Leonard Roberts or Ann Roberts, (Appellants seem to be confused as to which of the two), who owned the equipment rather than the Bankrupt. Finally, Appellants argue that Aetna turned over the proceeds payable for equipment destroyed to the First National Bank of Atlanta to pay off a debt of Ann Roberts that was secured by a purchase money security interest in the equipment. Appellants maintain that Aetna acted improperly in turning the money over to the bank rather than to Ann or Leonard Roberts.

These assertions of Appellants are indicative of the lengths to which Appellants have gone to "conjure up" an argument. Assuming the truth of each of their factual assertions, Aetna did nothing improper by turning the money over to the bank. In fact, the bank would likely have had a good claim against Aetna if Aetna had not turned the money over to it. *See* Ga. Code Ann. Sec. 109A-9—504 (c). In any event, it is literally inconceivable how either Appellants or the Bankrupt was harmed by Aetna's alledgedly improper dispositon of the insurance proceeds on equipment, and Appellants have failed to offer any explanation or supporting authority for their assertions.

(16) Incredibly, without request, motion, or explanation, Appellants' response to a brief filed by the Trustee directed at Appellants' Rule 60(b) motion consisted of a xerox copy

of the Trustee's brief with inked in interlineations, crossings and handwritten notations in the margins of the pages. Similarly, Appellants' Third Amendment to their Rule 60(b) motion consisted of a xerox copy of their original motion with handwritted notations on the margin.

In addition to the highly questionable practice of a party photocopying the brief of another party and asserting the brief to be its own, such form is in direct violation of the letter and spirit of Rule 151.1 of the Local Rules of the District Court of this District requiring that all papers filed in a case shall "be plainly and fairly written or printed without erasures or interlineations materially defacing them . . ."

(17) On September 8, 1977, this Court entered an order directing Appellants, Aetna and the Trustee to appear before the Court on September 19, 1977, for a hearing upon Appellants' remanded Rule 60(b) motion. Appellants on September 13, 1977, filed with the Court an application requesting a continuance of the scheduled hearing; urging the Court to prohibit counsel for Aetna from participating at the hearing; requesting the Court to have all discovery taken in the Trustee's lawsuit "incorporated by reference" for use at the hearing; and asking the Court to set aside two to three weeks of its calendar to devote to the hearing on the Rule 60(b) motion. On Friday, September 16, 1977, this Court denied this application in all respects. On that same date, Appellants filed an appeal to the District Court, which had remanded the Rule 60(b) motion to this Court, alleging error by this Court in allotting only the morning of Monday, September 19, 1977, for the commencement of the hearing instead of scheduling two to three weeks as requested. Appellants prayed the District Court to order this Court to schedule two to three weeks for the Rule 60(b) hearing. As the record discloses, this Court planned to and did allow sufficient hearing time to the proceeding. Appellants throughout this case seem to be confused about the relationship of the District Court and the Bankruptcy Court. In seeking such an order from the District Court, Appellants' counsel referred to this Court as the Bankruptcy Division of the District Court, and denominated the remand of the Rule 60(b) motion as to a

"special master" for the District Judge.* At the scheduled hearing on September 19, 1977, Appellants moved the Court for a stay of the hearing pending disposition of the appeal which they had by then taken from this Court's September 16th order, and requested this Court to reassign their Rule 60(b) motion to another Bankruptcy Judge whose calendar would permit the devotion of two to three weeks to a hearing. This Court likewise denied these requests, and the District Court on December 28, 1977, entered an order denying Appellants' appeal, most appropriately characterizing Appellants' request for a two to three week hearing as "without merit" and "frivolous."

Assuming that the proof on the Rule 60(b) motion would be consistent with the pleadings and contentions of Appel-

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*As with other law and procedure in this bankruptcy case, counsel for Appellants should know that this Court is not a division of the District Court and a Bankruptcy Judge is not a special master in bankruptcy cases. Section 2a of the Bankruptcy Act establishes the Court of Bankruptcy as a separate court within the District Court but with independent statutory and equitable jurisdiction and function from the District Court. See also Advisory Committee's Note to Rule 901(7), Collier Pamphlet Ed., p 975; See also Report No. 95-595, 95th Cong., 1st Sess., Committee on the Judiciary, House of Representatives, Bkcy Law Revision, Sept. 8, 1977, starting at 9: "The result of these developments in the law has been to recognize the Bankruptcy Judge as a regular judicial officer that handles only bankruptcy cases. Thus, Bankruptcy Judges today comprise a *de facto* specialized court system within the District Courts." See also Committee Print No. 13, 95th Cong., 2d Sess., Bankruptcy Courts, Report of the Subcommittee on Civil and Constitutional Rights of the Committee on the Judiciary, House of Representatives, January, 1978, p. 8: – even without the legislation proposed by this committe[sic] "today the Bankruptcy Court constitutes a separate court system.")

Orders of the Bankruptcy Judge are final (Bankruptcy Rule 803), except when appealed to the District Court (Bankruptcy Rule 801), wherein the clearly erroneous rule is applicable (Bankruptcy Rule 810) as in the case of any further appeal to the Court of Appeals; the Bankruptcy Judge is the trial judge of matters in the Bankruptcy Court and the District Judge is the appellate judge of orders of the Bankruptcy Judge on appeal [Rules 901(7), and 903(4)], except in cases where a District Judge may by special designation of the District Court be sitting as the trial judge (as Bankruptcy Judge) in the matter in the Bankruptcy Court [See Bankruptcy Rule 90294] See House Report, No. 95-595, Sept. 8, 1977, *supra*, stating at p. 9: "The only control the District Judges still retain is the appointment and removal process, in hearing appeals of Bankruptcy Judges' decisions, and in the exercise of certain powers reserved to the District Courts by statute." [Footnotes omitted]

lants, the Court set hearing dates and allowed extensive hours for each day of hearing to be sure that procedural and substantive due process was accorded Appellants. Yet, in no instance was the evidence consistent or supportive of the claims. The prior order of this Court entered on January 5, 1978, outlines at length the time and consideration that was devoted to Appellants on that frivolous motion. Nevertheless, counsel for Appellants demanded additional hearing time on the Rule 60(b) motion.

This Court finds that the foregoing actions and requests of Appellants were frivolous, without merit, and taken for improper purposes.

(18) Appellants, through their counsel, sought to have themselves "deputized" in order to carry forward the litigation against Aetna with Appellants' counsel representing the interests of the Trustee.

This form of solicitation is highly irregular, and, in the Court's view, improper. The Trustee is an officer of the Court and a fiduciary representative of all the creditors. Representation of the Trustee in matters affecting the estate should not be soliciated by any creditor or attorney for a creditor.* Moreover, as previously noted by this Court, there may be a conflict of interests for this attorney for Appellants when said attorney concurrent[sic] represents the Trustee and Appellants, who are plaintiffs in a suit against Aetna.

(19) At various times during the hearings on Appellants' Rule 60(b) motion and the hearings on the instant applications, Appellants' counsel asserted unwarranted objections that counsel for Aetna was exhibiting a demean-

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*Congressional concern over the abuses and unethical conduct that may occur in the administration of a Chapter XI case is evidenced by Bnkr. Rule Proc., 208(c), 11 USC, which prohibits the solicitation of proxies by an attorney from creditors who are not clients prior to such solicitation. *In Re DARLAND*, 184 F.Supp. 760 (S.C. Iowa 1960), and in proposed Bankruptcy Act Sec. 1102(b), H.R. 8200, 95th Cong., 2d Sess. (1978), which prohibits an attorney employed by a creditors committee from representing any other entity in connection with the case. See generally BANKRUPTCY ACT REVISION: Hearings On H.R. 31 and 32 Before Subcomm. on Civ. and Const. of the Comm. on the Judiciary, House of Representatives, 94th Cong., 1st & 2d Sess. 1141-1190, 1549-1563 (1976).

ing manner, a condescending attitude and was badgering witnesses in connection with cross-examination.

Usually this Court ignored such outbursts and urged Appellants' counsel to refrain and move the hearing along; but, as this Court noted for the record on at least one occasion, *see* Transcript dated April 6, 1978, at pp. 35-37, Appellants' counsel's repeated suggestions regarding the demeanor and cross-examination by Aetna's counsel were grossly misstated, exaggerated, and inaccurate. In the opinion of the Court, such objections were made solely for the purpose of delay and to create the impression in one reading the transcript that trial improprieties were taking place when, in fact, they were not.

(20) At the hearing on these applications, the Court permitted Appellants to have two continued dates to offer evidence on their lack of bad faith. Appellants sought to demonstrate their lack of bad faith through the testimony of witnesses who were officers or employees of three of the five Appellants—International, White Lumber and Versapanel. Neither Hampton nor Gold Rey offered any testimony or evidence of good faith.

(21) At the conclusion of the first hearing on these applications for assessment of expenses, which was held on February 14, 1978, this Court announced from the bench that, based upon its famliarity with the case and the argument of counsel with regard to the applications, it found that Appellants had conducted themselves improperly in these proceedings, as alleged by Aetna and the Trustee, thereby subjecting themselves to the assessment of expenses of litigation needlessly imposed upon Aetna and the Trustee. Several weeks thereafter, Appellants' counsel, by letter, requested the Court to allow Appellants an opportunity to present rebuttal evidence of their good faith. Although Appellants had never once at the initial hearing requested the Court to allow them to present any such evidence, the Court nonetheless responded to Appellants' counsel by letter, dated March 29, 1978, that they would be afforded an opportunity to present such evidence provided that Appellants inform counsel for Aetna and counsel for the Trustee in writing and in advance of the hearing of the names of those persons that Appellants would call as witnesses. At the hearing it was learned that

Appellants' counsel failed to give the required written notice, but rather had communicated orally the names of three witnesses to Aetna and the Trustee. However, at the hearing, Appellants sought to introduce a fourth, previously unidentified witness.

Although the Court ultimately allowed each witness to testify, notwithstanding objections for noncompliance with the Court's directive, the Court merely notes that this type of conduct is typical of the conduct of the Appellants and their counsel in this case.

(22) Appellants make much of the fact that, at one point in time, the Trustee and his counsel apparently considered the possibility of filing a voidable preference action against one of Appellants, International Paper Company. Appellants contend that because the Trustee's counsel formerly represented International Paper in this bankruptcy proceeding, the Trustee's counsel disclosed privileged information to the trustee about the circumstances giving rise to the possible preference action. Therefore, Appellants contend, the Trustee and his attorneys should be removed for unethical conduct and an irreconciliable conflict of interests.

The simple fact of the matter is that the Trustee has *not* filed any such preference action against International Paper. Moreover, Appellants do not know whether the information obtained by the Trustee about a preference received by International Paper came from the Trustee's counsel or, as the Trustee's counsel stated, from the discovery taken of International Paper and others in connection with the plenary action filed by the Trustee. Regardless of the source of the information, mere disclosure of such information to the Trustee would not warrant his removal from office in this proceeding. It is interesting, however, to observe that Appellants, who all along have claimed lack of diligence by the Trustee in this case, should now claim that the Trustee has been "overly diligent" in investigating a preference claim against one of their own. Diligence by the Trustee is not measured on the basis of whose ox is or may be gored, as Appellants seem to conclude.

(23) Throughout the hearing before this Court on Appellants' remanded Rule 60(b) motion and the instant applications, Appellants repeatedly referred to the fact that

counsel for Aetna and counsel for the Trustee were sitting together at the counsel table and had, according to Appellants, conferred with each other from time to time regarding strategy and methods for obtaining a favorable resolution on Appellants' Rule 60(b) motion and a final ruling on the question of the propriety of the settlement. Appellants suggested that such conferences were indicative of "fraud" by both counsel and ineptitude on the part of the Trustee in thus "consorting with the enemy."

The Court sees nothing whatsoever out of the ordinary or unethical for counsel representing clients who have a mutual interest in the outcome of litigation to confer with one another. Indeed, such conferences are to be expected. Appellants' suggestion to the contrary is but another example of their repeated efforts to obfuscate the issues and to cast a cloud upon the conduct of all concerned with this proceeding except, of course, themselves.

(24) Appellants similarly attempted at the hearings on the instant applications to make much of the fact that counsel for Aetna and the Trustee had, in the past, been involved in several bankruptcy proceedings as counsel for clients therein. Apparently, Appellants were trying to show that the Trustee and Aetna's counsel were close professional friends and therefore were conspiring to compromise the interests of this estate in furtherance of their professional relationship and to the detriment of Appellants whose counsel presumably was not a close professional friend of these lawyers.

The innuendos clearly contained in Appellant's observations are both unsubstantiated and unwarranted. The Court found then and finds now that such observations were not called for and were made simply as a means of diverting the Court's attention from the merits of the various positions being advanced in this litigation.

(25) Appellants have consistently and gratuitously during these proceedings cast aspersions upon the integrity and competence of counsel, parties, non-parties and former counsel to parties. Such remarks have bordered on being slanderous, if not indeed slander per se, and have in no way contributed to an orderly, dispassionate presentation of the various issues which Appellants claim are "substantial".

(26) But for the refusal of counsel for Appellants to abide by pre-trial announcements of the Court as to the scope and limits of the issues and evidence expected at the hearings on the Rule 60(b) motion, the hearings in this proceeding should have been concluded in a fraction of the time actually consumed. Counsel for Appellants continued to examine witnesses as to irrelevant matters, despite rulings of the Court. Since each objection to such irrelevant examination brought lengthy exchanges from counsel for Appellants, counsel for Aetna and the Trustee refrained from making appropriate repeated objections. Therefore, the Court was forced at times to call attention to irrelevant and improper questions in order to assure that the hearings were confined to the issues at hand. Counsel for Appellants displayed open hostility and hard feelings, far beyond the traditional adversarial bent, bias and vigor, to opposing parties, their counsel, this Court, and occasionally the District Court.

From the foregoing, the Court finds as a matter of fact and concludes as a matter of law that Appellants and their counsel have intentionally and knowingly multiplied and compounded this proceeding and have unduly delayed the conclusion of this bankruptcy proceeding, causing considerable and unnecessary expense, anguish and concern to the Trustee, Aetna and their counsel who were unwilling litigants in a matter that was settled two years ago for $350.00; that Appellants have asserted in their various appeals, motions, briefs and other papers filed in this case legal positions without supportive authority and contrary to well-settled principles of law as if such positions were the law; that they have inappropriately and inaccurately cited cases; have asserted positions that are frivolous; that they have unnecessarily and gratuitously cast aspersons upon the parties, their counsel, and other persons who are not parties; that they have misrepresented both facts and law; that they have repeatedly and purposefully conducted improper examination of their own witnesses; that they have utilized the process and procedures of this Court improperly and for improper purposes; that they have caused unnecessary expenses to be incurred by Aetna and the Trustee in the defense of these vexatious, irrelevant and frivolous actions and motions, all to the detriment of

the fair and prompt administration of this bankruptcy case.

There remains the questions whether Aetna and/or the Trustee are legally entitled to any relief as requested by them on the basis of the foregoing findings of the Court.

Authority To Assess Legal Expenses

Although the general American rule regarding attorney's fees requires that each litigant shall bear his own legal expenses, there are exceptions to the rule. Where the ends of justice so require, the equitable power of a federal court to award attorney's fees in exceptional circumstances is well-established. *See, e.g., Hall v. Cole,* 412 U.S. 1 (1973); *Sprague v. Ticonic National Bank,* 307 U.S. 161 (1939); *Fairley v. Patterson,* 493 F.2d 598 (5th Cir. 1974); *Kinnear-Weed Corporation v. Humble Oil & Refining Co.,* 441 F.2d 631 (5th Cir. 1971); *Robertson v. Wilkinson,* 10 F.2d 311 (5th Cir. 1926). In the case of *Christianburg Garment Co. v. EEOC,* 54 L.Ed. 648 (1978), the United States Supreme Court, construing a provision for attorney's fees in Title VII of the Civil Rights Act of 1964, rejected the argument that fees under the statute could only be awarded in cases of bad faith, observing that:

> "Congress did not intend to permit attorney's fees to a prevailing defendant only in the situations where the plaintiff was motivated by bad faith in bringing the action. As pointed out in [the] Piggie Park [case], if that had been the intent of Congress, *no statutory provision would have been necessary, for it has long been established that even under the American common-law rule attorney's fees may be awarded against a party who has proceeded in bath faith . . .* [A] plaintiff should not be assessed his opponent's attorney's fees *unless a court finds that his claim was frivolous, unreasonable or groundless,* or that the plaintiff continued to litigate after it clearly became so.

Id. at 655, 657 (emphasis added). *See also, Gates v. Collier,* 70 F.R.D. 341 (N.D. Miss. 1976); *Signal Delivery Service, Inc. v. Highway Truck Drivers,* 68 F.R.D. 318 (E.D. Pa. 1975).

The authority of this Bankruptcy Court as a court of equity to insure that justice is accorded to the parties and to remedy injustices where they occur in proceedings brought before it cannot be doubted. Part and parcel of the equitable powers of the Court is the power to assess costs and to impose monetary sanctions against parties or their counsel when the processes of the Court are ignored or abused. In the case of *In re Swafford,* 112 F.Supp. 893 (D.Minn. 1952), for example, the District Court affirmed on appeal a Bankruptcy Court's assessment of attorney's fees in favor of the trustee against a creditor found to have acted in bad faith, the court observing that

> "The authority of the bankruptcy court to tax attorney's fees as costs, in the absence of statutory authorization, rests in its equitable jurisidction, and such authorization is expressly invested by Section 2, sub. a, of the [Bankruptcy] Act . . ."

Similarly, in the case of *In re Swartz,* 130 F.2d 229 (7th Cir. 1942), the Seventh Circuit upheld a Bankruptcy Judge's assessment of legal expenses against creditors who were found to have filed frivolous pleadings, noting:

> "These actions of the appellants required 162 docket entries. Of 157 court appearances made by counsel for the trustee after appellants had consented to the adoption of the plan, 124 were necessarily made in preserving the plan from the attacks of the appellants . . . . The referee found that by reason of the unnecessary, groundless, vexations[sic], and oppressive petitions, motions, and other acts and conduct of the appellants, appellee had been required to be present in open court and to employ counsel, for which he is entitled to fair and reasonable compensation . . . and ordered that the total expense, amounting to $1,000, be charged against the appellants as costs . . . . The allowance of counsel fees is not usually allowed against an unsuccessful litigant . . . . In actions at law, costs follow the result as of course, but in equity costs not otherwise governed by statute are given or withheld in the sound discretion of the court according to the

> facts and circumstances of the case, . . . and may be assessed, against a party found to have brought groundless and unwarranted claims causing expense to the estate . . ."

Id. at 231 & 232.

Rule 11 of the Federal Rules of Civil Procedure, and its counterpart in Rule 911 of the Bankruptcy Rules of Procedure, sets forth the obligation of counsel in civil proceedings and provides that:

> "The signature of an attorney constitutes a certificate by him that he has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay . . . . For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action."

Bankruptcy Rule 911 extends the requirements of Rule 11 to encompass not only pleadings, but also motions and applications filed in bankruptcy cases, and Rule 7(b)(2) specifically makes Rule 11 applicable to motions and other papers.

Rule 11 and Bankruptcy Rule 911 are designed to place upon counsel a definite moral and professional obligation in drawing up and presenting pleadings, motions and other papers. *Peter Kiewit Sons' Co. v. Summit Construction Co.*, 422 F.2d 242 (8th Cir. 1969); 13 Collier On Bankruptcy Sec. 911.05 (14th ed. 1975). His signature is a certificate of good faith. *See Goodwin Film & Camera Corp. v. Eastman Kodak Co.*, 222 F. 249 (2d Cir. 1915). A reputable attorney should not and cannot file sham or frivolous pleadings and motions, or insert scandalous or indecent matter, and an attorney who does so should be disciplined. *See United States for Benefit of Foster-Wheeler Corp. v. American Surety Corp.*, 25 F.Supp. 225 (E.D.N.Y. 1938).

The obligations imposed upon counsel by Rule 11 and Bankruptcy Rule 911 are also embodied in the provisions of Ethical Consideration No. 7-4 of the Georgia State Disciplinary Rules, which states that "a lawyer is not justified in asserting a position in ligiation that is frivolous."

Furthermore, Section 1927 of Title 28 of the U.S. Code is most pertinent to the obligations of counsel and provides sanctions for those who abuse the judicial system:

> "Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in a case as to increase costs unreasonably and vexatiously may be required by the Court to satisfy personally such excess costs."

The policy and objective of the Bankruptcy Act to move cases promptly and expeditiously in a specialized court in order to preserve resources of the bankrupt for the benefit of creditors upon net asset distribution, and the current overburden of the caseload in each court, supports the wisdom of these Rules, which place substantial responsibility squarely upon attorneys as officers of the court to refrain from being frivolous in matters which they bring before the courts.

The provisions of 28 U.S.C. Sec. 1927 have been applied in a number of cases where it was found that an action was frivolous or was being asserted for harrassment, delay or some other improper purpose. *See, e.g., Browning Debenture Holder's Committe v. DASA Corp.*, 560 F.2d 1078 (2d Cir. 1977); *Acevedo v. Immigration and Naturalization Service*, 538 F.2d 918 (2d Cir. 1976) (costs of frivolous appeal assessed against attorney on basis of record); *Suel v. Addington*, 465 F.2d 889 (9th Cir. 1972) (affirming assessment as not an abuse of discretion where action found "frivolous" by trial court); *Harrell v. Joffrion*, 73 F.R.D. 267 (W.D. La. 1976); *cf. Weiss v. U.S.*, 227 F.2d 72 (2d Cir. 1955) (effort to keep litigation alive under Rule 60(b) was criticized and court stated costs would be assessed if repeated).

Although this statutory provision is directed primarily at counsel, it has been applied to both counsel and client on occasion. *See, e.g., Eastern Renovating Corp. v. Roman Catholic Bishop*, 554 F.2d 4 (1st Cir. 1977) (taxing appellees with $2,500.00 as attorney's fees).

The provisions of FedR.Civ.P. 11 and 28 U.S.C. Sec. 1927 were recently applied in the case of *In re Truman Bright*, 3 Bankr. Ct. Dec. 881 (E.D. Pa. 1977) (B. J. King), where the

Bankruptcy Judge found that the bankrupt's attorney had filed groundless pleadings and, upon the trustee's motion, taxed the trustee's legal expenses against the attorney. The Bankruptcy Court, relying upon Rule 11 of the Federal Rules and 28 U.S.C. Sec. 1927, observed that:

> "An attorney has the duty to establish a reasonable basis in facts that can be proven [by] admissible evidence before signing and filing a pleading. Aside from the ethical considerations, there is a very practical reason for this rule, because otherwise meaningless, voluminous, worthless and misleading pleadings could be filed in abundance . . . . An attorney's filing of a pleading that is not subsequently supported by any admissible evidence serves no purpose and only misleads and wastes the time of the court and opposing counsel . . . . *In such circumstances, the responsible attorney should be held personally liable for the legal expenses that his misconduct caused the opposing party . . . to incur.*

Id. at 881 and 882. (emphasis added).

There are numerous reported decisions in which the courts have assessed attorney's fees against a party or his counsel, either in the main action or on appeal, on the basis of the above-discussed principles, statutory provisions and rules when bad faith in the proceedings was found. For example, in *Robertson v. Wilkinson,* 10 F.2d 311 (5th Cir. 1926), the Fifth Circuit in a bankruptcy proceeding dismissed an appeal as "frivolous and without any support of authority" and ordered that *damages* be assessed against the appellants in favor of the appellee in the amount of $2,600.00.

The Third Circuit Court of Appeals, as early as 1944, held in the case of *In re Midland United Co.,* 141 F.2d 692 (3d Cir. 1944), that an appeal in a corporate reorganization bankruptcy, which was wholly frivolous and taken for the purpose of delay, could be dismissed on that basis, with an award of damages in the amount of $1,000.00 to the trustee for attorney's fees incurred by him on appeal.

Moreover, in the case of *Matter of Sunset Plaza, inc.,* 546 F.2d 232 (8th Cir. 1976), the Eighth Circuit Court of

Appeals dismissed an appeal in a bankruptcy proceeding as frivolous and assessed attorney's fees against the creditor/ appellant. Noting that the district court in denying the relief requested by the creditor/appellant had referred to the case as a "tortured appeal", the court made the following observation, which is most pertinent to this proceeding:

> "It is indeed unfortunate that this ordinary bankruptcy proceeding has been prolonged by seven years of seeming endless litigation without affording relief to many of the parties. The record discloses nonsensical whipsaw appeals back and forth and back again between the bankruptcy court and the district court . . . . Primarily due to these tactics, it now apears that administrative expenses and fees will deplete the residual funds and thus there exists little likelihood that many of the creditors will receive even partial reimbursement. *Although counsel are entitled to be contentious in an adversary setting, this does not allow them to turn the administration of justice into a game of prolix pleadings* (over 700 filings), *endless and irrelevant examination and frivolous appeals*. It is of great concern to this court that such tactics can wastefully occupy the time of the bankruptcy and federal district courts. *Counsel, who pursue the practice of law in this fashion discredit their profession and provide disservice to their clients.*"

Id. at 234, n. 1 (emphasis added).

In the case of *Overmyer v. Fidelity & Deposit Co. of Maryland*, 554 F.2d 539 (2d Cir. 1977), the court was confronted with what it characterized as a "crass misuse of both the state and federal judicial systems". *Id.* at 540. Among other things, the defendants sought to vacate a judgment rendered against them on the grounds of newly-discovered evidence, as to which the trial court stated:

> "In point of fact, after reviewing the 'proof' adduced by defendants, it is the belief of this *court that the instant motion is merely another ploy*

utilized by (defendants) in an attempt to avoid the full force and effect of a judgment . . ."

Id. at 541. (emphasis added).

The Second Circuit, after reviewing the procedural joustings which the trial court found "reprehensible", *Id.* at 542, held that defendants' appeal was frivolous and assessed against defendants double costs of the appeal and $2,000.00 as attorney's fees. The court observed that:

> "It has not escaped our attention that appellants were assisted by counsel . . . in bringing this sham suit and appeal . . . . The use of this court solely as a dilatory tactic to avoid paying a judgment is a serious breach of professional ethics . . . We remind the Bar that under Fed. R.Civ.P. 11 the signature of an attorney on a pleading 'constitutes a certificate by him that it is not interposed for delay'. We will not countenance attempts to pervert the federal judicial process into a *Dickensian* court where lawsuits never end."

Thus, while assessing the costs and fees against the clients, the court intimated that the same could well have been placed upon their counsel.

In *Kiefel v. Las Vegas Hacienda, Inc.*, 404 F.2d 1153 (8th Cir. 1968), *cert. denied* 395 U.S. 908, *reh. denied* 395 U.S. 987, the court ordered an attorney to pay one-third of the attorney's fees incurred on appeal by reason of the attorney's misconduct in making misstatements of fact and law, injecting inflammatory statements into arguments calculated to prejudice the juries and conducting improper cross-examination on issues to which the trial court had already sustained objections.

In *Quality Molding Co. v. American National Fire Inc. Co.* 287 F.2d 313 (7th Cir. 1961), the court found that an attorney had seriously misquoted an important precedent in this brief and observed:

> "Attorneys whose names are affixed to briefs filed in this Court have a heavy responsibility to see to it that quotations from the opinions of

other courts as well as other statements therein are completely accurate."

Id. at 316.

This "heavy responsibility" of counsel, which is embodied in the mandate of FRCP Rule 11, requires that they not advance as well-settled propositions of the law that which actually runs counter to established principles. It is one thing to argue for an extension of an interpretation of the law; it is quite another to represent something to *be* the law when there is no authority for the proposition being asserted and there is clear, substantial authority to the contrary.

Based upon the foregoing discussion and the cases cited therein, the Court is of the opinion that counsel fees may be assessed in this case against either the Appellants or their counsel, or both. Furthermore, on the basis of the record of this case and all matters brought before it at the numerous hearings upon these applications, the Court has concluded that an assessment of fees in this case is appropriate to the ends of justice and that such fees should be borne by both Appellants and their attorney of record. The Court is not unmindful of the fact that an assessment of expenses should be reserved for "extraordinary" cases. But the Court believes that this case is, indeed, an extraordinary one, and it has been only after long hours of hearings and consideration of this matter that the Court has come to the decision which it now has. Counsel for Appellants has argued that an assessment of legal expenses would punish Appellants for exercising their legal rights and would serve to discourage appeals. On the contrary, an assessment of expenses in cases such as the one at bar does not punish Appellants by reason of their exercise of such rights, but instead correctly shifts to them the costs only where they have used the process and procedures of the Court in a frivolous, bad faith, vexatious and dilatory manner. The assessment will not discourage appeals having a semblance of merit and some legal basis; although the Court recognizes that it may discourage appeals which are frivolous, sham, bad faith, vexatious and dilatory.

Amount of Assessment

One final question remains, which is the appropriate amount of the expenses to be assessed. This Court is vested with the discretion to determine the reasonableness of attorney's fees for services performed in matters over which it has presided, and can proceed upon its own knowledge of the value of the services rendered. *See North Drive-In Theatre Corporation v. Park-In Theatres, Inc.*, 248 F.2d 232 (10th Cir. 1957). However, the Court has substantial evidence before it concerning the amount of time expended by Aetna's counsel and counsel for the Trustee on the matters for which the instant assessment of expenses is requested. Affidavits have been submitted, depositions taken, a stipulation entered into and testimony given at the several hearings held for that purpose. The Court is convinced that the expenses sought are legitimate, reasonable and were occasioned by reason of the above-described actions of Appellants and their counsel.

With respect to Aetna's application, counsel for Aetna has testified, both by deposition and at the hearing on this matter, which testimony is unchallenged, that based upon the number of hours expended in connection with the appeal, the Rule 60(b) motion, and the hourly billing rate charged for such services, Aetna has incurred attorney's fees of $4,988.50, plus costs of $147.80. The Court finds that the total request of $5,136.30 is reasonable for the services rendered, and the Court will, therefore, award such amount to Aetna.

With respect to the Trustee in his capacity as attorney, the requested amount to be assessed is $7,440.00. The Trustee has testified concerning the amount of hours expended by him and his testimony is likewise unchallenged. The Court finds said amount to be reasonable for the services rendered and will, therefore award such amount to the Trustee.

With respect to the Trustee's co-counsel, the requested amount to be assessed is $23,745.00. The parties have entered into a stipulation concerning the amount of hours expended by such co-counsel. For the services rendered, the Court finds said amount to be reasonable. Based upon that stipulation, the testimony of such co-counsel, and the Court's findings, the Court hereby awards to the Trustee's co-counsel, Freeman & Hawkins, the sum of $23,745.00

Conclusion

Accordingly, for the reasons set forth hereinabove, the Court has heretofore entered an order granting the applications of Aetna, the Trustee and the Trustee's counsel for assessment of expenses.

This 11th day of September, 1978.

/s/ WILLIAM L. NORTON, JR.
U.S. BANKRUPTCY JUDGE
U.S. BANKRUPTCY COURT
U.S. DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt

Bankruptcy Case No. B74-1628A

[Filed November 14, 1978]

MEMORANDUM

On June 7, 1978, this Court entered an order assessing against International Paper Company, Hampton Lumber Sales Company, White Lumber Sales, Inc., Versapanel, Inc. (now Quinault Pacific Corporation), Gold Rey Forest Products, Inc. and their counsel, W. Kent Bishop (hereinafter collectively referred to as "Appellants"), the amount of attorney's fees and expenses incurred by Aetna Business Credit, Inc., the Trustee John C. Pennington and the Trustee's co-counsel, Freeman & Hawkins, as a result of Appellants' bad faith, frivolous and vexatious conduct in these proceedings.

On October 13, 1978, the U.S. District Court on appeal affirmed this Court's assessment, but remanded the matter to this Court for the entry of additional findings of fact regarding the number of hours expended and expenses incurred which form the basis for the assessment.

Extensive hearings on these factual matters have already been held; depositions have been taken of the Trustee, the Trustee's co-counsel, and counsel for Aetna; affidavits have been submitted; and the Trustee's co-counsel and Appellants have entered into a written stipulation concerning the hours expended by the Trustee's co-counsel. The Court feels that the record before it is complete and that the additional factual findings may be made without the necessity of further hearings.

In accordance with the District Court's order of remand, this Court herewith submits the following additional findings of fact in support of its order of June 7, 1978:

Additional Findings of Fact

A. Award to Aetna

The Court hereby finds, with respect to the award made to Aetna, that:

(1) In connection with Appellants' appeal from this Court's order authorizing the settlement between Aetna and the Trustee, counsel for Aetna testified that they expended a total of 30.2 hours, of which 27.8 were expended by Mr. C. Edward Dobbs at $45.00 per hour, and 2.4 were expended by Mr. R. William Ide, III, at $65.00 per hour, for a total of $1,416.00. Appellants have not contended that said amount of time was not expended.

(2) In connection with Appellants' Rule 60(b) motion, counsel for Aetna testified that they expended a total of 48.1 hours, of which 45.4 were spent by Mr. Dobbs at $55.00 per hour and 2.7 were spent by Mr. Ide at $85.00 per hour, for a total of $2,726.50. Appellants have not contended that said amount of time was not expended.

(3) In connection with the February 14, 1978, hearing on expenses before this Court, Aetna's counsel testified that they expended a total of 11.5 hours by Mr. Dobbs at $60.00 per hour, for a total of $690.00. Appellants have not contended that said amount was not expended.

(4) Aetna expended the sum of $130.65 for the transcript of the February 14, 1978, proceedings before this Court. Appellants do not contest this fact.

(5) The total of the foregoing amounts is $5,137.30, which is greater by the sum of $1.00 than the amount awarded to Aetna by the Court in its order of June 7, 1978. Aetna's counsel testified that Aetna paid the sum of $5,137.30 to its counsel for such services, and Appellants have not contested this fact.

(6) The time expended by Aetna's counsel over a two-year period in the foregoing matters was reasonable and necessary in light of the legal services required. The billing rates charged by Aetna's counsel were reasonable for the services required and consistent with the rates charged by attorneys of like experience and ability in the Atlanta area for similar matters. Not only skill in commercial and bankruptcy matters, but also a degree of patience was required of Aetna's counsel to achieve the results obtained, which were consistently in favor of Aetna.

B. Award To Trustee's Co-Counsel

The Court hereby finds, with respect to the award made to the Trustee's co-counsel, Freeman & Hawkins, that:

(1) The Trustee's co-counsel and Appellants entered into a written Stipulation on May 2, 1978, which, together with the affidavit of co-counsel for the Trustee, constitutes the basis for the Court's award.

(2) In connection with the initial Rule 60(b) motion of Appellants, the Trustee's co-counsel expended a total of 79.8 hours, which, at the hourly rate of $50.00 per hour (which Appellants agreed in the Stipulation was reasonable for such services), totals $3,990.00.

(3) In connection with the Rule 60(b) motion as amended and prior to the remand to this Court, the Trustee's co-counsel expended 17.6 hours, which, at the agreed-upon rate of $50.00 per hour, totals $880.00.

(4) In connection with the remanded Rule 60(b) motion, the Trustee's co-counsel expended 72.3 hours, which, at the agreed upon rate of $50.00 per hour, totals $3,615.00.

(5) In connection with Appellants' appeal from this Court's order approving the settlement between Aetna and the Trustee, the Trustee's co-counsel expended 105.7 hours, which, at the agreed upon rate of $50.00 per hour, totals $5,285.00.

(6) In connection with the Trustee's application for assessment of attorney's fees against Appellants, the Trustee's co-counsel expended 39.5 hours, which, at the agreed upon rate of $50.00 per hour, totals $1,975.00.

(7) In connection with the plenary action of the Trustee before the District Court, the Trustee's co-counsel expended a total of 150 hours, all of which time was necessitated by reason of Appellants' appeal from this Court's settlement order and their Rule 60(b) motion, and which, at the agreed upon rate of $50.00 per hour, totals $8,000.00.

(8) The total of the foregoing amounts is $23,745.00, which the Court finds to be a reasonable fee for the services rendered and which were necessitated by the bad faith actions of Appellants. Many of the questions raised by Appellants and addressed by the Trustee's co-counsel were novel and ran the gamut from bankruptcy and commercial law to appellate practice and jurisdiction. The Trustee's co-counsel displayed great skill and understand-

ing in addressing these issues by brief and oral argument. Undoubtedly, the substantial amount of time required of the Trustee's co-counsel in this no-asset case precluded other remunerative employment by them. However, the Trustee's co-counsel delivered a high quality of legal services to the Trustee and to the bankrupt estate, and achieved consistently favorable results on behalf of the Trustee. Representation of the Trustee and the no-asset estate was undeniably an "undesirable" undertaking as the prospects for compensation for such representation were and are slight. While Appellants have stipulated that a fee of $50.00 per hour is a fair and reasonable charge for the services rendered, the Court now affirmatively finds that such an hourly rate is reasonable in bankruptcy cases and particularly in this case in light of the experience, reputation and ability of the Trustee's co-counsel.

C. Award To Trustee

The Court hereby finds, with respect to the award made to the Trustee, that:

(1) The fee award to the Trustee was and is based upon an hourly fee basis of $50.00 per hour, which the Court finds to be a reasonable hourly rate for the services rendered by the Trustee and in light of the Trustee's experience in bankruptcy matters.

(2) The fee award to the Trustee of $7,440.00 was and is reached by multiplying 138.8 hours expended by him in responding to the various motions and pleadings of Appellants times the hourly rate of $50.00 per hour.

(3) Of the total time expended by the Trustee, at least 19.6 hours were expended by the Trustee in connection with attending depositions and hearings related to the plenary action and necessitated by Appellants' continued efforts to frustrate the settlement between the Trustee and Aetna.

(4) The Trustee expended at least 10.6 hours in connection with Appellants' appeal from this Court's order approving the settlement with Aetna, for a total fee award of $530.00.

(5) The Trustee expended at least 36.8 hours in connection with Appellants' Rule 60(b) motion, for a total fee award of $1,840.00.

(6) The Trustee expended 5.5 hours in connection with the hearing before this Court on the application for assessment of expenses, for a total fee award of $275.00.

(7) The remaining hours expended by the Trustee are not capable of being categorized as having been spent in connection with any particular aspect of this case, and the Trustee has testified that such time was necessitated by Appellants' repeated motions, pleadings, appeals and efforts to frustrate the settlement and to remove the Trustee. The Trustee's time records, however, do not specify and the Trustee is unable to determine with certainty for such remaining time whether it was spent on the Rule 60(b), the appeals by Appellants, or the plenary action.

(8) The Trustee has ably represented himself in this matter; has refused to surrender the duties of his office at the request of and upon motion by Appellants despite the slim prospects for remuneration in this case and despite the repeated attacks upon his diligence; has prevailed in every instance on matters initiated by Appellants; and has endured repeated attacks by Appellants of[sic] his professional abilities in what for him must be for all purposes an unpopular and financially unrewarding, no-asset case.

This 14th day of November, 1978, in Atlanta, Georgia.

/s/ WILLIAM L. NORTON, JR.
U.S. BANKRUPTCY JUDGE
U.S. DISTRICT COURT

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN C. PENNINGTON, TRUSTEE FOR GEORGIA PANELING SUPPLY, INC., Bankrupt,
Plaintiff,

vs.

AETNA BUSINESS CREDIT, INC., AND THE C&S BANK OF NORTH FULTON, Defendants,

INTERNATIONAL PAPER COMPANY, ET AL,
Intervenors.

CIVIL ACTION FILE NO. C75-1440A

[Filed July 25, 1978]

ORDER OF COURT

It appearing to the Court that certain depositions have been taken herein and are on file in the Clerk's office, that the Bankruptcy Judge presiding in the bankruptcy case of which the within civil proceedings provises[sic], Georgia Paneling Supply, Inc., Bankrupt, Bankruptcy No. B74-1528A, and that said Bankruptcy Judge has requested the authority to open said depositions regarding matters pending before him;

IT IS ORDERED that Bankruptcy Judge William L. Norton, Jr., be authorized to open any and all depositions on file in the above-styled civil proceeding for purposes of reviewing matters now pending before him.

This the 24th day of July, 1978.

/s/ RICHARD C. FREEMAN
U.S. DISTRICT COURT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN C. PENNINGTON, ET AL.

vs.

AETNA BUSINESS CREDIT, ET AL.

Civil Action No. 75-1540A

[Filed March 30, 1978]

ORDER

This is an action brought by the trustee in bankruptcy [hereinafter the "trustee"] of Georgia Paneling Supply, Inc. [hereinafter "GPS"] to avoid certain allegedly preferential or fraudulent transfers of property to two GPS secured creditors, Aetna Business Credit, Inc. [hereinafter "Aetna"] and the Citizens and Southern Bank of North Fulton [hereinafter "C&S"]. The remaining intervenors in this action,[1] International Paper Company [hereinafter "International"], Hampton Lumber Sales Company [hereinafter "Hampton"], White Lumber Sales, Inc. [hereinafter "White"], Versapanel, Inc. [hereinafter "Versapanel"] and Gold Rey Forest Products, Inc. [hereinafter "Gold Rey"] have asserted a number of claims against Aetna including *inter alia*: (1) conversion of intervenors' lumber and supplies; (2) misrepresentation; and (3) nondisclosure. In addition, intervenors have lodged claims against C&S including the allegations: (1) that C&S fraudulently omitted or misrepresented certain material facts to intervenors and (2) that C&S exerted such dominance and control over GPS as to render it the alter-ego or instrument of C&S thereby making C&S responsible for the indebtedness of GPS. The instant action is presently before the court on defendants' motions for summary judgment.[2] Before pro-

[1] Two other intervenors previously have been allowed to withdraw from this action by dismissing their claims with prejudice.

[2] We have considered defendants' prayer for oral argument on the motions *sub judice*, *see* Local Court R. 91.3, and conclude on the basis of experience with this litigation that oral argument would obfuscate rather than clarify the factual and legal issues in this action.

ceeding to the merits of the motions *sub judice*, a brief review of the salient facts and allegations is warranted.

In June of 1973, defendant C&S evidently had met its legal limit with respect to loaning funds to GPS. C&S evidently encouraged GPS to look to a larger lender for additional funds and in June of 1973 GPS and Aetna entered into an agreement whereby Aetna agreed to advance money to GPS against accounts receivable pledged by the bankrupt to Aetna. To secure the indebtedness outstanding as a result of these advances, GPS granted to Aetna a security interest in all of GPS's then existing and after-acquired accounts receivable and inventory. Aetna duly perfected its security interest by filing a financing statement in the clerk's office of the Gwinnett County Superior Court. Pursuant to its loan documents, Aetna allegedly performed audits upon GPS periodically after July, 1973. Intervenors sold lumber and supplies to GPS on open account between July 1973 and June 3, 1974, when they brought suit to enforce collection of the debt.[3] After several defaults by GPS, on June 7, 1974, Aetna foreclosed upon and took possession of the inventory collateral at the premises of GPS and proceeded to liquidate it.

The intervenors contend in essence that after making several loans to GPS, C&S and Aetna jointly and severally withheld or misrepresented GPS's insolvent financial status and lent GPS enough funds to keep suppliers funneling goods into GPS until GPS had substantial inventory built up. At that point, C&S "converted" the supplier's or GPS's goods which the suppliers purportedly had been fraudulently induced to sell to GPS in substantial satisfaction of the outstanding debt. The specifics of defendants' arguments will be addressed *seriatim* pursuant to the several motions for summary judgment.

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[3] White allegedly sold goods with a value of $16,350.80 to GPS on or about December 5, 1973. Versapanel made a similar sale on or about August 7, 1973, for a price of $12,974.89. International made numerous sales to GPS during 1973 totalling $104,718.11. On or about March 8, 1974, Gold Rey sold goods to GPS for a price of $9,431.20. The precise dollar amount of goods sold by Hampton to GPS is not entirely clear.

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT ON INTERVENORS' CONVERSION CLAIMS

Defendants argue that summary judgment is appropriate as to intervenors' conversion claims under both the Uniform Commercial Code, *see* Ga. Code Sec. 109, and the common law of Georgia.[4]

With respect to a claim under the Code, the intervenors have several immediate problems. First, the sales transaction between merchants is typically completed upon physical delivery of the goods. *See* Ga. Code Sec. 109A-2-401. This general rule is modified by Ga. Code Sec. 109A-2-702 which allows the seller of goods to reclaim them if the buyer received the goods while insolvent and the seller makes a demand for their return within ten days after their receipt by the buyer. It is clear that all of the subject goods were in the possession of GPS for more than ten days before Aetna or C&S foreclosed its security interests. The evidence with respect to the making of a demand is much less clear. However, it is entirely clear in this circuit under an identical code provision that the rights of an unpaid seller are subordinated to those of a secured creditor, asserting a security interest in the buyer's inventory. *In re Samuels & Co., Inc.*, 526 F.2d 1238 (5th Cir. 1976). Therefore, it would initially appear that summary judgment on intervenors' code claim is warranted. However, two obstacles impede that judicial path.

First, as intervenors argue, the entire legal structure of the code is bottomed upon the premises of good faith and fair dealing. Ga. Code Sec. 109A-1-203. Accordingly, there

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[4] The intervenors suggest that since this diversity action is ancillary to a bankruptcy action federal common law should apply. *See generally, Sears, Roebuck & Co. v. Stiffel Co.*, 376 U.S. 225 (1964); *Compco Corp. v. Day-Brite Lighting, Inc.*, 376 U.S. 234 (1964). However, intervenors do not show how federal common law might differ from the law of Georgia. In fact, intervenors rely most heavily upon a Georgia state court case, *Central Soya Company, Inc. v. Bundrick*, 137 Ga. App. 63, 222 S.E.2d 852 (1975). Moreover, the basic doctrines underlying intervenors' claims such as conversion and misrepresentation, find their definition in the law of Georgia. In any event, we are not convinced that there is present in this action a specific federal statute which is *sui generis* and the total implementation of which demands the application of federal common law. Accordingly, we must preliminarily conclude that the law of Georgia applies to the claims *sub judice*. *See Erie v. Tompkins*, 304 U.S. 64 (1938).

is some authority for the proposition that a party with an otherwise valid priority may be estopped from asserting it if bad faith on its part is shown. *Thompson v. United States*, 408 F.2d 1075 (8th Cir. 1969); *Central Soya v. Bundrick*, 137 Ga. App. 63, 222 S.E.2d 852 (1975). Moreover, there is some, albeit sparse, evidence in the form of deposition testimony and circumstance which when viewed in the light most favorable to intervenors could lead to the permissible inference that Aetna and/or C&S were acting in "bad faith." Moreover, Ga. Code Sec. 109A-1-103 provides that the code does not override or abolish common law principles. Therefore, intervenors assert that they still have a common law cause of action for conversion.

Defendants argue in essence that an action for conversion does not lie here because: (1) money in general cannot be converted unless it is specifically identified. *Sparks & Hudson v. Fort*, 27 Ga. App. 349 (1921); *Stahl v. Commer*, 7 Ga. App. 308 (1909). However, as intervenors argue, goods, not money, were originally tendered to GPS and by GPS's and Aetna's own admission they cannot state whether or not the goods were in fact sold. Therefore, we should assume that the goods exist in unaltered form because defendants should not be allowed to benefit from their asserted lack of knowledge. Moreover, even if the goods were sold, the selling price between intervenors and GPS is known and the action in conversion for trover should not be defeated because of mere transformation of the goods, *see generally*, W. L. Prosser, *The Handbook of the Law of Torts*, Sec. 15 (1971), because a "chose in action" rather than a mere debt remains after the transformation. In any event, it appears that under Georgia law the property need not be described before the action is taken to the jury. *See Phillips v. South Cobb Bank*, 117 Ga. App. 137, 159 S.E.2d 495 (1968).

Aetna's argument that the "ownership" of the goods passed to GPS under Ga. Code Sec. 109A-2-401 upon delivery and therefore intervenors had no possessory interest in the goods has no merit. Under this conversion claim, the central issue is one of common law title, *see Abney v. M.B. Thomas Auto Sales Co.*, 93 Ga. App. 224, 91 S.E.2d 189 (1956), a concept which has no real meaning under the code. The location of title therefore must be determined by general Georgia law which provides that non-payment or

payment by bad check results in the title to the item sold remaining in the vendor. *Ballentine Motors of Georgia v. Nimmons, et al.*, 93 Ga. App. 708 (1956). Therefore, it is at least arguable that at the time of the alleged conversion intervenors had an adequate possessory interest to support an action for conversion.

In sum then, it appears that the material issues of fact which remain for adjudication in connection with intervenors' "conversion" claims under the code and the common law of Georgia include: (1) Aetna's arguable "bad faith";[5] (2) the existence and adequacy of intervenors' demands upon GPS and/or Aetna; and (3) the existence and/or extent of intervenors' possessory interest in the allegedly converted goods at the time of their alleged conversion. Accordingly, Aetna's motion for summary judgment as to intervenors' "conversion" claims is hereby DENIED.

AETNA'S AND C&S' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO INTERVENORS' MISREPRESENTATION AND OMISSION CLAIMS

Intervenors contend in essence that defendants should be held liable for allegedly misrepresenting to intervenors, directly or indirectly, that the financing relationship between Aetna and GPS was current and in good standing, thereby inducing intervenors to sell GPS additional goods.

In order to maintain a cause of action for fraud or deceit in Georgia, plaintiff must show: (1) a false representation made by the defendant; (2) which the defendant knew or should have known was false; (3) an intention to induce the plaintiff to act or retrain from acting in reliance by the plaintiff; (4) justifiable reliance by the plaintiff; and (5) damage to the plaintiff. *Romedy v. Willett Lincoln-Mercury, Inc.*, 136 Ga. App. 67, 220 S.E.2d 74 (1975); *City*

[5] The major act of "bad faith" argued by intervenors is the collection of the insurance proceeds from a fire at one of GPS's stores which operated on a cash basis when those proceeds allegedly were needed to rebuild the store and thereby pump additional cash flow into GPS. In addition, there is some sparse evidence that Aetna's representatives may have used language that could have been construed as suggesting that GPS not pay its suppliers.

Dodge, Inc. v. Gardner, 232 Ga. 766, 208 S.E.2d 794 (1974); *Eastern Motors Co. v. Lavender*, 69 Ga. App. 52, 24 S.E.2d 840 (1943). Defendants' arguments that they made no misrepresentations upon which intervenors relied cannot prevail upon the instant motion for summary judgment because there is some evidence that the alleged misrepresentations might have been made, directly or indirectly. Likewise, the question of whether intervenors exercised reasonable case in seeking to ascertain the truth about GPS is one of fact, *Kidder & Co. v. Clement A. Evans Co.*, 111 Ga. App. 814, 156 S.E.2d 164 (1967), which at present is somewhat ambiguous. Even if it is true as defendants argue that intervenors did not inquire of Aetna and C&S as to GPS's financial status, there appears to be no requirement in the cases that the inquiry be lodged directly with the same sources from which the alleged misrepresentations emanated. Rather, it appears only that the inquiries must be "reasonable" under the circumstances. *See Hannah v. Belger, supra; United States v. Northeast Construction Co. of West Virginia*, 298 F. Supp. 1135 (S.D. Ga. 1969) (should have inquired about specifications with the Corp of Engineers); *Brim v. Couch*,, 184 Ga. 310 (1937). We cannot say as a matter of law on the record presently before this court that intervenors' efforts to investigate the parameters of the alleged fraud were unreasonable. However, the issue with respect to omissions is more troublesome.

As defendants argue, in order for nondisclosure to be a basis for fraud in Georgia, there must first be a duty to communicate. *See Dickey v. Leonard*, 77 Ga. App. 151 (1886). Such a duty arises only where there is (1) a confidential relationship between the parties; or (2) when the surrounding circumstances in equity and good conscience require disclosure *See* Ga. Code Sec. 37-704. Such duties are rarely implied. *See United States v. Northeast Construction Co., supra.*

Applying the Uniform Commercial Code for comparison, Georgia law provides that a secured creditor is only required to give notice to the debtor and to other secured parties having a security interest in the same collateral. To imply an additional duty of giving notice to unsecured creditors all of whom the foreclosing party might or might not be able to locate, would not only effectively nullify the foregoing code provision, but also would unduly burden common commercial practice and render foreclosure and

ultimately the use of security devices impractical. In addition, it might expose a secured party to potential liability for libel and slander, *see Hood v. Dun & Bradstreet, Inc.*, 486 F.2d 25 (5th Cir.), *cert. denied*, 415 U.S. 985 (1973), because Georgia law does not recognize a conditional privilege for credit reporting agencies. *See generally, Retail Credit Co. v. Russell*, 234 Ga. 765, 218 S.E.2d 54 (1975). Nothing found in *Walter E. Heller & Co. v. Aetna Business Credit, Inc.*, C.A. No. 75-216A (Sept. 29, 1975) (Freeman, J.) dictates a contrary result.[6] Accordingly, we believe that intervenors have failed to carry their burden of showing that such a duty with respect to omissions by defendants should be implied. However, this is not to say that the representations made by defendants were not required to be full and accurate. An affirmative misrepresentation may be made by simply stating a half-truth or conveying a misleading impression. *See* W. L. Prosser, *Handbook of the Law of Torts*, Sec. 106 at 694 (1971). Accordingly, we hold only that while defendants had no duty to make any representations at the outset, when and if they undertook to do so, they had a duty to make sure that those representations were accurate and reasonably complete.

Accordingly, for the reasons hereinabove expressed, defendants' motion for partial summary judgment concerning intervenors' claims based on misrepresentation is GRANTED with respect to omissions unaccompanied by affirmative misrepresentations and is DENIED in all other respects.

C&S' MOTION FOR PARTIAL SUMMARY JUDGMENT AS TO INTERVENORS' CLAIMS OF "ALTER-EGO" CONTROL

C&S also seeks partial summary judgment as to intervenors' claims that C&S dominated and controlled GPS to such an extent that GPS became the C&S "alter ego", thereby rendering C&S liable for GPS debts. Generally, for the alter ego doctrine to be found applicable, the plaintiff must show: (1) that there is such a unity of ownership and

[6] In the order of September 29, 1975, this court simply held that the fraud claims could not be dismissed at that time because the counsel moving for dismissal had failed to comply with Local Court Rule 91.1 by filing an accompanying memorandum of law citing supporting authorities.

interest that the corporate identity of the "alter-ego" is disregarded and ultimately destroyed; and (2) that to adhere to the doctrine of corporate entity would promote injustice and protect fraud. 1 Fletcher, *Cyclopedia of the Law of Private Corporation*, Sec. 41.1 (1974). In this circuit, the former requirement has been posited in terms of total domination and control of the subject corporation. *Krivos Industrial Supply Co. v. National Distillers and Chemical Co.*, 483 F.2d 1098 (1973). While the mere loaning of money does not meet this test, *see Peterson v. Chicago Rock Island & Pacific Ry. Co.*, 205 U.S. 364 (1907), lending institutions like C&S are not automatically exempted from the "instrumentality" rule. If a lender becomes so involved with its debtor that it is actively managing the debtor's affairs then liability may be found. However, partial or shared management evidently is not enough to trigger the implementation of the rule. *Krivo Industrial Supply Co. v. National Distillers and Chemical Corp., supra.* Nevertheless, the evidence used to establish the requisite control may be circumstantial as well as direct. *Trans-American Communication, Inc. v. Nolle*, 134 Ga. App. 457, 214 S.E.2d 717 (1975).

The application of these principles to the instant action does not yield an entirely clear result. There is some evidence that the relationship between GPS officers and Hugh Lane of C&S was unusually close and that defendants' officers were regularly on the GPS premises. In addition, there is some evidence that defendants had extended so much money to GPS that they had acquired something approaching an equity interest in GPS operations. Defendants in turn argue that the evidence demonstrates that they never attempted to run the day-to-day operations of GPS. Specifically, they refer to testimony of T. R. Locke, president of GPS to the effect that he did not have daily contract with Hugh Lane or Aetna officials and that they simply had a friendly business relationship. Taking all the facts and inferences from circumstantial evidence[7] most favorable to intervenors, it is not com-

[7] For instance, notwithstanding Mr. Lock's testimony, it arguably is inferable from the other direct and circumstantial evidence that defendants were in fact making the operational and managerial decisions for the last few months of GPS operation.

pletely clear that sufficient control to satisfy the rule did not exist. The apparent conflict between the facts and circumstances revealed by intervenors and the testimony of Mr. Locke is not properly resolved on the instant motion for summary judgment. *See* 10 C. Wright and A. Miller, *Federal Practice and Procedure*, Sec. 2725 (1970). Morever, even if the depositions and other facts were subject to some variety of reconciliation, it would be unwise to pretermit this issue when it is only one of several complex interrelated issues, the balance of which we have already determined must proceed to trial. *See* 10 C. Wright and A. Miller, *Federal Practice and Procedure*, Sec. 2728 (1970). Therefore, we conclude that a material issue of fact remains as to the degree of control allegedly exerted by C&S over GPS. Accordingly, the C&S motion for summary judgment against intervenors on their "alter-ego" or "instrumentality" theory is hereby DENIED.

In sum, this court has today: (1) DENIED the motion for partial summary judgment of C&S and Aetna relating to intervenors' conversion claim; (2) GRANTED Aetna's and C&S's motion for partial summary judgment with respect to all omissions unaccompanied by affirmative representations and DENIED that motion with respect to all other alleged misrepresentations; and (3) DENIED C&S's motion for partial summary judgment as to intervenors' claim of alter-ego control.

IT IS SO ORDERED.

This, the 30 day of March, 1978.

/s/ RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN C. PENNINGTON, TRUSTEE

vs.

AETNA BUSINESS CREDIT, INC., ET AL.

CIVIL ACTION NO. 75-1540A

[Filed September 30, 1976]

ORDER

This is an action brought by the trustee in bankruptcy of Georgia Paneling Supply Co., Inc. to set aside a preference to the Citizens & Southern Bank of North Fulton [hereinafter "C & S Bank"] that is allegedly voidable under Sec. 60b of the Bankruptcy Act, 11 U.S.C. Sec. 96(b), and to set aside a transfer of property to Aetna Business Credit, Inc. [hereinafter "Aetna"] which is allegedly voidable under Sec. 70a and e of the Bankruptcy Act, 11 U.S.C. Sec. 110(a) and (e).

Several of the bankrupt's unsecured creditors have filed a motion to intervene in the instant action on the grounds that their interests are not being adequately represented by the trustee. On March 31, 1976, the court deferred ruling on the pending application for intervention, in order to allow the putative intervenors to clarify the nature of the claims they intend to assert by intervention and also to allow the parties to file briefs with respect to the question of whether consolidation of the related plenary actions might be preferable to intervention herein. In the March 31 order, the court noted that there was an outstanding application to settle and compromise the trustee's claims with respect to Aetna that was filed by the trustee in the bankruptcy proceeding. In order to avoid the possibility that settlement of the claims might render the petition for invervention moot, this court specifically stated:

> *this* court will refuse to entertain any application for approval of a settlement and/or voluntary dismissal [of this action] pending disposition of the pending motions.

On June 16, 1976, following a hearing, the bankruptcy judge entered an order authorizing the trustee to settle and dismiss the claims in the instant litigation with respect to Aetna. *In re Georgia Paneling Supply, Inc.*, Bankruptcy No. B74-1528A (June 16, 1976). At that time the bankruptcy judge also denied the putative intervenors' motion for removal of the existing trustee and appointment of a successor trustee. Counsel for Aetna duly advised this court of the bankruptcy court's action in a letter dated June 24, 1976. As a result of the bankruptcy judge's approval of the application for settlement, a "Stipulation for (Voluntary) Dismissal" signed by counsel of record for plaintiff-trustee and defendant Aetna was filed in the office of the Clerk of this court, dismissing the action insofar as it related to Aetna. *See* Rule 41(a), F.R.C.P. Apparently, it was later discovered that since not all of the parties to the action *sub judice* had signed the voluntary dismissal in accordance with Rule 41(a), the order was submitted to this court for its approval on June 23, 1976.

As it is the policy of this court to encourage amicable settlement of pending lawsuits and there being no apparent objection to the settlement of this portion of the action, this court duly signed the purported consent order on June 23, 1976. However, it is now evident to this court that settlement and/or voluntary dismissal of the claims against Aetna is clearly inconsistent with this court's order of March 31, 1976, in which we noted that no motions for settlement and/or dismissal would be entertained until the intervention question had been resolved. It is clear, however, that these parties herein have either misunderstood or disregarded this court's order by presenting the stipulation of dismissal. (In fact, such may have resulted from a casual conversation between the trustee and the undersigned.) Whatever the cause, the order entered by this court on June 23, 1976, approving the dismissal of this action insofar as it relates to defendant Aetna Business Credit, Inc. is hereby VACATED.

Thus, the motion to intervene filed on behalf of International Paper Company, Hampton Lumber Sales Company [hereinafter "Hampton"], Walter E. Heller and Company, (Inc.), Johns-Manville Sales Corporation, Goldrey[sic]

Forest Products, Inc., Versapanel, Inc., and White Lumber Sales, Inc. is presently before this court.

Rule 24(a), Fed. R. Civ. P., allows a party, upon timely application, to intervene as a matter of right

> " . . . when the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by the existing parties."

The putative intervenors are unsecured creditors of the bankrupt, Georgia Paneling Supply Company[sic], and claim an interest in the property which is the subject matter of the trustee's action to set aside the alleged voidable transfer and voidable preference to defendants herein. In addition to their derivative claims, they also assert individual claims against the defendants based, *inter alia*, upon claims of tortious interference with contract, fraud, and conversion. Two of the applicants, Hampton and Walter Heller, have also filed independent plenary actions against Aetna for conversion of the property which is the subject matter of the instant litigation, alleging, in essence, that Aetna converted the property before title passed to the bankrupt.

Aetna's objections to the application for intervention *sub judice* is three-fold: (1) that the application for intervention was not timely filed; (2) that the applicants do not have a sufficient property interest in the litigation since their interests are contingent and they could not be bound by any judgment herein under principles of res judicata because the putative intervenors are neither parties nor privies of the trustee; and (3) that in any event, the interests of the applicants herein are being adequately represented by the trustee in bankruptcy. These objections will be discussed seriatim.

Timeliness of intervention is, in the first instance, a question committed to the sound discretion of the trial court. *Diaz v. Southern Drilling Corp.*; 427 F.2d 1118, 1125 (5th Cir. 1970), *cert. denied sub nom.*,[sic] 400 U.S. 878; *McDonald v. E. J. Lavino Co.*, 430 F.2d 1065, 1074 (5th

Cir. 1970). *See generally*, C. Wright & A. Miller, *Federal Practice & Procedure*, Sec. 1916, at 579 (1972). Timeliness is to be judged by two criteria: (1) the length of time during which the putative intervenor has known about his interest in the litigation without acting and (2) the harm or prejudice to the rights of existing parties by delay occasioned if intervention is granted. *Id.* The instant action was filed by the trustee on July 9, 1975, and removed to this court on August 5, 1975. The motion for intervention *sub judice* was filed January 20, 1976. The approximate six-month delay in seeking intervention was apparently occasioned by the applicants' belief that the trustee, in bringing the action, was acting in the best interests of the bankrupt's estate and their further belief that the trustee would prosecute the claims to the fullest. Thus, the eleventh-hour application for intervention was filed only after the trustee presented a proposed settlement to the bankrupt court whereby the action would be dismissed as to defendant Aetna for a mere $350.00. At that time it first became evident to movants that the trustee did not diligently seek to prosecute the action against Aetna. Under these circumstances, we are unable to conclude that the proposed intervenors have forfeited their rights to intervention solely because of the passage of six months since the action was filed, *see id.*, at 1125 (passage of one year); *Kozak v. Well*, 278 F.2d 104 (8th Cir. 1960) (application timely although a year late); *Innis, Speiden & Co. v. Food Machine Corp.*, 2 F.R.D. 261 (D. Dela. 1942), since the time element must be judged in light of existing circumstances and not in a vacuum. *Smith Petroleum Serv., Inc. v. Monsanto Chemical Corp.*; 420 F.2d 1103, 1115 (5th Cir. 1970). *Accord, Dudley v. Southeastern Factor and Finance Corp.*; 57 F.R.D. (N.D. Ga. 1972).

The more critical question, however, is not the mere delay in seeking intervention, but the possibility of prejudice that the delay may cause to existing parties. *Diza v. Southern Drilling Corp.; supra*, 427 F.2d at 1126. At the outset, we note that in situations in which intervention as of right is claimed, it is presupposed that the putative intervenor may be seriously harmed if he is not permitted to intervene; thus, courts should be more reluctant to deny

a request for intervention as of right as untimely, than where merely permissive intervention is sought. *Id.; McDonald v. E. J. Lavino Co., supra,* at 1073. *See generally* C. Wright & A. Miller, *supra,* Sec. 1916, at 573. Finally, as a general consideration, an application for intervention filed after the entry of judgment, either as a result of a trial on the merits or after a settlement has been entered should ordinarily be "looked upon with a jaundiced eye," *McDonald v. E. J. Lavino Co., supra,* at 1072, and a more compelling showing of the need for intervention is required of the applicant. *Id.* In the preceding portion of this court's order we have set aside and vacated the purported consent judgment of dismissal with respect to defendant Aetna, because of this court's previous determination that the action should be neither dismissed nor settled until a definitive ruling could be had on the motion *sub judice.* Because of the critical nature of the interests sought to be asserted by the applicants, which will be discussed more fully below, this court is unable to conclude that the putative intervenors have failed to meet the exacting standards required of applicants at a late stage in the litigative process. *See generally* 3B J. W. Moore, *Moore's Federal Practice,* Par. 24.13[1] (1969). In sum, this court concludes that the instant application for intervention is timely.

The second requirement for intervention as of right is that the applicant claim an interest relating to the property or transaction that is the subject matter of the action. It is well settled that to satisfy this prerequisite, the applicant must show "a significantly protectible interest," *Donaldson v. United States,* 400 U.S. 517 (1971). The nature of that interest is not, however, to be determined by overly strict legal concepts of property interests without resort to practical considerations. *Nuesse v. Camp,* 385 F.2d 694 (D.C. Cir. 1967). In this respect, the applicants are further required to show that disposition of the main action, may as a practical matter impair or impede their ability to protect their interests. The proposed intervenors herein fall within the general category of unsecured creditors of the bankrupt estate, with certain exceptions. Hampton Lumber Sales Company and Walter E. Heller & Company (Inc.) are "conditional" unsecured creditors of the bankrupt; that is, they allegedly supplied lumber and other supplies to the bankrupt; however, they assert that

defendant Aetna may have taken possession of the lumber prior to the transfer of title to the bankrupt. Aetna's conduct with respect to the lumber and supplies in question is both the subject matter of the instant action, as well as the subject matter of independent plenary actions for conversion filed by these applications against defendant Aetna. *See Hampton Lumber Sales v. Aetna Business Credit, Inc.*, Civil Action No. 74-1579A (N.D. of Ga.); *Walter E. Heller & Co., (Inc.) v. Aetna Business Credit, Inc.*, Civil Action No. 75-216A (N.D. of Ga.). Thus, Hampton and Heller have a direct interest in the identical property which is the subject matter of the trustee's action. The remaining five applicants for intervention are unsecured general creditors of the bankrupt.

Aetna has objected to intervention on the grounds that the applicants have mere contingent interests in the property that is the subject matter of the action, since their proofs of claim have not been allowed; they, therefore, assert that a mere contingent interest in the outcome of pending litigation is insufficient to warrant intervention as of right. *See Kheel v. American Steamship Owners Mutual Protection and Indemnity Association, Inc.*, 45 F.R.D. 281, (S.D. N.Y. 1968). *Kheel* held that appliants for intervention who were merely 5 out of 120 negligence claimants of a bankrupt steamship line were not entitled to intervention as of rights since they had not proved their claims under the Bankruptcy Act nor had they reduced such to judgment. *Id.* at 284. *See also Peterson v. United States*, 41 F.R.D. 131, 133 (D. Minn. 1966) (contingent remaindermen under testamentary trust had no absolute right to intervene in action brought by executor of estate to recover alleged overpayment of taxes in absence of showing of nonfeasance by executor or adverse interests).

Both *Kheel* and the *Peterson* decision are predicated primarily upon more technical concepts of direct "property" interests which were the substance of intervention as of right prior to the amendment of Rule 24 in 1966. *Cascade Natural Gas Corporation v. El Paso Natural Gas Company*, 386 U.S. 129 (1967) significantly broadened the types of interests that may form the basis of intervention as of rights. Moreover, Professors Wright and Miller have discussed the precedential value of the *Kheel* and *Peterson* decision and clarified their meaning as follows:

> In *Kheel v. American S.S. Owners Mut. Protection & Indem. Ass'n*, D.C. N.Y. 1968, 45 F.R.D. 281, 284, the court said: "The mere existence of a third person's contingent interest in the outcome of pending litigation is insufficient to warrant intervention." *Taken out of context this might suggest a rule against recognition of a contingent interest. Taken in context*, and particularly in the light of the court's citation, as authority for that sentence, of *Peterson v. U.S.*, D.C. Minn. 1966, 41 F.R.D. 131, 133, it is clear that all the court meant *is that the existence of a cognizable interest is not enough for intervention unless the other two requirements of Rule 24(a)(2) are met.* In the *Peterson* case itself the court specifically held that the applicants had a sufficient interest to justify intervention but it denied their application because they were adequately represented by existing parties.

C. Wright & A. Miller, *supra*, Sec. 1908, at 503 n.26. (emphasis supplied).

We agree with the professors' comments in this respect. In the first instance, movants have demonstrated a real interest in the instant litigation, albeit derivative and somewhat contingent; further, they seek to assert individual claims. The nature of the applicants' interests and the effect that disposition of the action may have on their ability to protect those interests are so closely related, that what interests are sought to be protected cannot be decided without reference to the practical disadvantages that the proposed intervenors may have in protecting their rights. *See Hobson v. Hansen*, 44 F.R.D. 18, 30 (D. D.C. 1968). *See generally*, C. Wright & A. Miller, *supra*, Sec. 1908, at 495-96. Similarly, the existence of legally cognizable contingent or derivative interests is insufficient in and of itself to justify intervention, if the trustee is adequately representing those interests.

With respect to the purported inability of applicants to protect their interests, Aetna has also maintained that the applicants would not be bound by disposition of the instant litigation by res judicata or other principles, nor would

they be prohibited from maintaining separate actions against the defendants on their individual claims. Under former Rule 24, intervention as of right was limited essentially to parties who would be legally concluded from pressing their claims by res judicata. *E.g., Sam Fox Publishing Co. v. United States*, 366 U.S. 683 (1961). However, the amendment to the rule recognizes that intervention as of right is appropriate where, as a *practical* matter, would-be intervenors may be impaired or impeded from protecting their interests in the property in the absence of intervention. This alteration of the rule was apparently designed to liberalize the right to intervention and to take it out of the *Sam Fox* res judicata rule. *E.g., Atlantis Development Corp.*, 379 F.2d 918, 823-24 (1967); *Nuesse v. Camp*, 385 F.2d 694, 701 (D.C. Cir. 1967). In the instant case, settlement of the main action or a disposition on the merits with respect to Aetna, that that defendant did not receive a preference voidable under the Bankruptcy Act, would not bind the applicants in a legal sense; but, it is, nevertheless, clear that principles of stare decisis may satisfy the practical disadvantage necessary to warrant intervention. *E.g., Id.; Nuesse v. Camp, supra; In re Oceana Int'l, Inc.*, 49 F.R.D. 329 (D. N.Y. 1969). Moreover, with respect to Hampton and Walter Heller, since they in fact assert an ownership interest in the property which is the subject matter of the instant litigation, it is evident that they have a sufficient property interest to warrant intervention. *E.g., Id.; Oceaniana International, Inc., supra*. Similarly, with respect to the claims of the putative intervenors against defendant Bank, which both incorporate the trustees allegations and assert individual claims, principles of stare decisis might as a practical matter frustrate the movants' ability to protect such interests.

Even assuming that the applicants have shown both a protectable property interest and some impairment of the ability to protect such interests, it is further incumbent upon the applicants to show that their interests are not or may not be adquately represented by existing parties. In *Kheel*, the district court held that as a general rule, in the absence of a showing of possible collusion or some other reason, the trustee in bankruptcy would be presumed to be an adequate representative of the unsecured creditors, 45

F.R.D. at 284. Furthermore, the *Kheel* court assumed that it was the burden of the proposed intervenors to show that representation was inadequate. There is some question as to whether the 1966 revisions to Rule 24 have, *sub silencio*, shifted the burden to the existing parties to show the adequacy of their representation. *Nuesse v. Camp, supra*, at 702. However, the Supreme Court in dicta in *Trbovich v. United Mineworkers of America*, 404 U.S. 537 (1972) has intimated that the burden may still lie with the putative intervenors to prove that representation is inadequate or may be inadequate; however, "the burden of making that showing should be treated as minimal." 404 U.S. at 539, n.10. In any event, assuming that the burden is on the applicants, it is evident that the Rule only requires a showing that representation *might* be inadequate. *Stadin v. Union Electric Co.*, 309 F.2d 912 (8th Cir. 1962) *cert. denied*, 373, 915.

As a general rule, the inadequacy of representation question has been found to turn upon "proof of collusion between the representative and an opposing party, by the representative having or representing an interest adverse to the intervenor, or by the failure of the representative in fulfilling his duty." *Id.*, 309 F.2d at 919. Aetna itself has recognized in its argument against consolidation of the instant action with the plenary actions filed by Hampton and Heller, that these two putative intervenors may have interests adverse to those of the trustee in the sense that in their independent actions they maintain that title to the subject property never passed to the bankrupt because of Aetna's prior conversion. With respect to these applicants intervention of right is appropriate, since it is well settled that when existing parties represent interests inimical to those of the proposed intervenors, intervention of right is warranted. *See, e.g., Atlantis Development Corp. v. United States, supra*, at 825; *Diaz v. Southern Drilling Corp., supra*, at 1125; *Martin v. Kalvar Corp.*, 411 F.2d 552 (5th Cir. 1969).

However, with respect to the five other applicants who are merely unsecured creditors, it would be presumed that the trustee is representing their interests and those of the bankrupt estate in the instant proceedings in the absence of evidence to the contrary. *See Kheel*. The putative inter-

venors have rather tactfully refrained from lodging a charge of "collusion" with respect to the trustee, defendant Aetna, and their respective counsel. However, the procedural history of the litigation *may* suggest that the trustee's representation has been inadequate and that there *may* have been some collusion, albeit solely for the purpose of terminating troublesome and time-consuming litigation. For example, the applicants, who represent almost half of the bankrupt's unsecured creditors, have repreatedly and unsuccessfully attempted to have the trustee replaced because of the lack of diligence in prosecuting the instant action. This court has itself, in its March 31 order, recognized the trustee's failure to respond to interrogatories and other motions. In that vein, unresponsiveness or the attempt to settle the claims for less than the applicants deem due may evidence a mere disagreement as to tactical considerations in the trustee's conduct of the lawsuit; tactical differences of opinion are insufficient, in and of themselves to justify intervention. *See Bumgartner v. Ute Indian Tribe of Unitah & Ouray Reservation*, 417 F.2d 1305 (10th Cir. 1969); *Stadin v. Union Elec. Co., supra*, at 919. But the lack of diligence on the part of the trustee, when viewed in conjunction with certain insinuations regarding the trustee's conduct is sufficient to show that the applicants' interests herein *may* not be adequately represented by the trustee. *See, e.g., Cuthill v. Ortman-Miller Mach. Co.*, 216 F.2d 336 (7th Cir. 1954); *Twentieth Century Fox Film Corp. v. Jenkins*, 7 F.R.D. 197 (S.D. N.Y. 1947); *Pyle-National Co. v. Amos*, 172 F.2d 425 (7th Cir. 1949). Since we need not and do not find that the trustee's representation *is* inadequate, but only *may* be inadequte, we think that intervention is justified.

Accordingly, for the reasons hereinabove expressed, the motion to intervene filed on behalf of International Paper Company, Hampton Lumber Sales Company, Walter E. Heller & Company, (Inc.), Johns-Manville Sales Corporation, Gold Rey Forest Products, Inc., Versapanel, Inc., and White Lumber Sales, Inc. is hereby GRANTED. The Clerk is hereby DIRECTED to allow filed the "Intervenors First Amended Complaint" and the defendants are hereby ORDERED to answer the allegations contained therein not later than twenty (20) days from the date of this order. It is

further ORDERED that this action be consolidated with *Hampton Lumber Sales v. Aetna Business Credit, Inc.*, C.A. No. 74-1579A and *Walter E. Heller & Co., Inc.*, C.A. No. 75-216A, *for purposes of pre-trial discovery.* The motion for default judgment against plaintiff and dismissing the action as to Aetna Business Credit, Inc. is hereby DENIED, and defendant Aetna Business Credit's motion for an order establishing certain facts and the genuineness of documents is hereby DENIED.

IT IS SO ORDERED.

This, the 30th day of September, 1976.

/s/ RICHARD C. FREEMAN
UNITED STATES DISTRICT JUDGE

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3370

D. C. Docket No. B74-1528-A

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt,

INTERNATIONAL PAPER COMPANY, ET AL., Appellant,

versus

JOHN C. PENNINGTON, TRUSTEE, AETNA BUSINESS CREDIT, INC., and **FREEMAN & HAWKINS** Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

Before **HATCHETT** and **TATE,** Circuit Judges and **GROOMS***, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that appellants pay to appellees, the costs on appeal to be taxed by the Clerk of this Court.

May 9, 1980 [Filed July 22, 1980]

ISSUED AS MANDATE: JUNE 20, 1980

*SeniorDistrict Judge of the Northern District of Ala., sitting by designation.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3370
Summary Calendar

D. C. Docket No.B74-1528-A

In the Matter of:
GEORGIA PANELING SUPPLY, INC., Bankrupt,
INTERNATIONAL PAPER COMPANY, ET AL.,
Plaintiffs[sic]-Appellants,

versus

JOHN C. PENNINGTON, TRUSTEE ET AL.,
Defendants[sic]-Appellees.

APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA

Before **GODBOLD, REAVLEY** and **ANDERSON,** Circuit Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and was taken under submission by the Court upon the record and briefs on file, pursuant to Rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

IT IS FURTHER ORDERED that the plaintiffs[sic]-appellants pay to the defendants[sic]-appellees the costs on appeal, to be taxed by the Clerk of this Court.

November 9, 1979 [Filed June 20, 1980]

ISSUED AS MANDATE:

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

GILBERT F. GANUCHEAU
CLERK

TEL. 504-589-6514
600 CAMP STREET
NEW ORLEANS, LA 70131

July 22, 1980

Mr. Ben H. Carter, Clerk
United States District Court
2211 U.S. Courthouse
75 Spring Street, S.W.
Atlanta, GA 30303

78-3370 - In the Matter of
Georgia Paneling Supply, Inc., Bankrupt;
International Paper Co., et al., v.
John C. Pennington, etc., et al.

79-1076 - In the Matter of
Georgia Paneling Supply, Inc., Bankrupt;
International Paper Co., etc., et al.

(USDC Nos. B 74-1628-A & B74-1628)

Dear Sir:

On June 20, 1980 this Court's judgments as mandate issued in the above causes. Those judgments were erroneously prepared on the first opinion of November 9, 1979 in case No. 78-3370 and the first opinion of November 19, 1979 in case No. 79-1076, which were vacated by this Court's order of December 28, 1979.

I am therefore requesting that you please return to this office the judgment previously issued in each of the above causes and I enclose to you and each of the attorneys in the

cases the corrected judgments which should have been issued on June 20, 1980.

Very truly yours,
GILBERT F. GANUCHEAU, Clerk
By /s/ Susan B. Vaughn
Case Manager

SBV:nb
Encl.
cc:w/enc.
Mr. Winford Kent Bishop
Mr. Ben H. Swank, Jr.
Mr. Douglas L. Cronkright
Mr. C. Edward Dobbs
Mr. R. William Ide, III
Mr. John C. Pennington

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 78-3370

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt.

INTERNATIONAL PAPER COMPANY, ET AL.,
Appellants.

versus

JOHN C. PENNINGTON, TRUSTEE, AETNA BUSINESS CREDIT, INC., AND FREEMAN & HAWKINS, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA

ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC
(Opinion May 9, 1980, 5 Cir., 1980, _____ F.2d____).
(June 3, 1980)

Before **HATCHETT** and **TATE**, Circuit Judges and **GROOMS***, District Judge.

PER CURIAM:
(x) The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate

Procedure; Local Fifth Ciruit Rule 16) the Petition for Rehearing En Banc is DENIED.

( ) The Petiton for Rehearing is DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, rehearing en banc is DENIED.

ENTERED FOR THE COURT:
/s/ ALBERT C. TATE
United States Circuit Judge Form 704-2

*Senior District Judge of the Northern District of Ala., sitting by designation.

Part Three: Constitutional Provisions, Statutes, Regulations, etc. Involved in These Cases

I. Constitutional Provisions.
   A. Article I, Sections 1 and 8
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II. Statutes
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      1. 28 U.S.C.A. Sec. 455
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      3. Bankruptcy Act of 1898, as amended Sections 41, 60b, 67, 70 (11 U.S.C. Sec. 69, 96b, 107, 110)
      4. Bankruptcy Code of 1978 Section 252 (28 U.S.C.A. Sec. 1481)
      5. 18 U.S.C. Sec. 401 (1970)
      6. 18 U.S.C. Sec. 402 (1970)
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III. Regulations, Rules, Ethical Precepts
   A. Ethical Precepts
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      3. Rules and Regulations for the Organization and Government of the State Bar of Georgia (241 Ga. 643 (1978) *et seq.*)
         (1) EC 1-4, DR 1-102
         (2) EC 7-35, DR 7-102, DR 7-110
         (3) EC 8-5, EC 8-6, Georgia Standard 60
         (4) DR 4-101 B, Georgia Standard 28
   B. Bankruptcy Rules of Procedure Rules 505, 920.
   C. Local Rules of the United States District Court for the Northern District of Georgia Rules 91.8, 351.1 Rules 71.34, 71.54

D. Federal Rules of Appellate Procedure
Rule 4(a), 6(a), 35, 40(a)
E. Federal Rules of Civil Procedure
Rule 38, 54(b), 60(b)
F. Federal Rules of Evidence
Rule 408

IV. Pleading and Motion Filed by Aetna Business Credit, Inc. in Related Lower Court Actions
A. Counterclaim, filed October 25, 1977 in *Pennington v. Aetna Business Credit, Inc.*, Civil Action No. C75-1540A (N.D. Ga., August 8, 1975)
B. Motion for Reconsideration, filed January 19, 1978 (14 days after "Opinion" in 60(b) Motion), in *Hampton Lumber Sales Co. v. Aetna Business Credit, Inc.*, Civil Action No. C74-1679A (N.D. Ga., August 22, 1974)

V. Miscellaneous
A. Chronological Events from Official Bankruptcy Records of Georgia Paneling Supply, Inc., Bankrupt No. B74-1628A and Referee's Calendars for September 19, 1977 and February 14, 1978
B. Critique of *In re Dekle* and *In re Boyd*, 308 So.2d 13, 5 (Fla. 1975)
C. Affidavit of Sandra Jean Thomasson, March 22, 1978.

Part Four: Analytical Tables

I. Table I (Analysis of Stipulation Between Freeman & Hawkins and Appellants)

II. Table II (Analysis of Trustee's Application for Fee Award)

III. Table III (Analysis of Aetna's Applications for Fee Awards)

IV. Table IV (Comparative Analysis of Fee Awards)

THE CONSTITUTION OF THE UNITED STATES

ARTICLE I

SECTION 1. All legislative powers herein granted shall be vested in a Congress of the United States which shall consist of a Senate and House of Representatives.

SECT. 8. The Congress shall have power —

To lay and collect taxes, duties, imposts, and excises; to pay the debts and provide for the common defence and general welfare of the United States: but all duties, imposts, and excises, shall be uniform throughout the United States;

To borrow money on the credit of the United States;

To regulate commerce with foreign nations, and among the several States, and with the Indian tribes;

To establish a uniform rule of naturalization, and uniform laws on the subject of bankruptcies throughout the United States;

To coin money, regulate the value thereof, and of foreign coin, and fix the standard of weights and measures;

To provide for the punishment of counterfeiting the securities and current coin of the United States;

To establish post-offices and post-roads;

To promote the progress of science and useful arts, by securing for limited times to authors and inventors the exclusive right to their respective writings and discoveries;

To constitute tribunals inferior to the Superior Court;

To define and punish piracies and felonies committed on the high seas, and offences against the law of nations;

To declare war, grant letters of marque and reprisal, and make rules concerning captures on land and water;

To raise and support armies, but no appropriation of money to that use shall be for a longer term than two years;

To provide and maintain a navy;

To make rules for the government and regulation of the land and naval forces;

To provide for calling forth the militia to execute the laws of the Union, suppress insurrections, and repel invasions;

To provide for organizing, arming, and disciplining the militia, and for governing such parts of them as may be

employed in the service of the United States, reserving to the States respectively, the appointment of the officers, and the authority of training the militia according to the discipline prescribed by Congress;

To exercise exclusive leglisation in all cases whatsover, over such district (not exceeding ten miles square) as may, by cession of particular States, and the acceptance of Congress, become the seat of the government of the United States, and to exercise like authority over all places purchased by the consent of the legislature of the State in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings; And

To make all laws which shall be necessary and proper for carrying into execution the foregoing powers, and all other powers vested by this Constitution in the government of the United States, or in any department or officer thereof.

ARTICLE III

SECTION 1. The judicial power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish. The judges, both of the supreme and inferior courts, shall hold their offices during good behavior, and shall, at stated times, receive for their services a compensation, which shall not be diminished during their continuance in office.

SECT. 2. The judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority; to all cases affecting ambassadors, other public ministers and consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States; between a State and citizen of another State; between citizens of different States; between citizens of the same State claiming lands under grants of different States; and between a State, or the citizens thereof, and foreign States, citizens, or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a State shall be party, the Supreme Court shall have original jurisdiction. In all

the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations, as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the State where the said crimes shall have been committed; but when not committed within any State, the trial shall be at such place or places as the Congress may by law have directed.

FIFTH AMENDMENT TO THE UNITED STATES CONSTITUTION

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use without just compensation.

SIXTH AMENDMENT OF THE UNITED STATES CONSTITUTION

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

28 U.S.C. SEC. 455

Sec. 455. Disqualification of justice, judge, magistrate, or referee in bankruptcy

(a) Any justice, judge, magistrate, or referee in bankruptcy of the United States shall disqualify himself in any

proceeding in which his impartiality might reasonably be questioned.

(b) He shall also disqualify himself in the following circumstances:

(1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

(3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;

(4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceedings, or any other interest that could be substantially affected by the outcome of the proceeding;

(5) He or his spouse or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) Is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) Is acting as a lawyer in the proceeding;

(iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

(c) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(d) For the purposes of this section the following words or phrases shall have the meaning indicated:

(1) "proceeding" includes pretrial, trial, appellate review, or other stages of litigation;

(2) the degree of relationship is calculated according to the civil law system;

(3) "fiduciary" includes such relationships as executor, administrator, trustee, and guardian;

(4) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, adviser, or other active participant in the affairs of a party, except that:

(i) Ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) On office in an educational, religious, charitable, fraternal, or civic organization is not a "financial interest" in securities held by the organization;

(iii) The proprietary interest of a policyholder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceeding could substantially affect the value of the interest;

(iv) Ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceeding could substantially affect the value of the securities.

(e) No justice, judge, magistrate, or referee in bankruptcy shall accept from the parties to the proceeding a waiver of any ground for disqualification enumerated in subsection (b). Where the ground for disqualification arises only under subsection (a), waiver may be accepted provided it is proceded by a full disclosure of the record of the basis for disqualification.

(As amended Dec. 5, 1974, Pub L 93-512, 88 Stat 1609.)

28 U.S.C. SEC. 144

Sec. 144. Bias or prejudice of judge

Whenever a party to any proceeding in a district court makes and files a timely and sufficient affidavit that the judge before whom the matter is pending has a personal bias or prejudice either against him or in favor of any adverse party, such judge shall proceed no further therein, but another judge shall be assigned to hear such proceeding.

The affidavit shall state the facts and the reasons for the belief that bias or prejudice exists, and shall be filed not less than ten days before the beginning of the term at which the proceeding is to be heard, or good cause shall be shown for failure to file it within such time. A party may file only one such affidavit in any case. It shall be accompanied by a certificate of counsel of record stating that it is made in good faith.

(As amended May 24, 1949, c 139, Sec. 65, 53 Stat 99.)

SECTION FORTY-ONE (11 U.S.C. SEC. 69)

Sec. 41. Contempts Before Referees.

a. A person shall not, in proceedings before a referee, (1) disobey or resist any lawful order, process, or writ; (2) misbehave during a hearing or so near the place thereof as to obstruct the same; (3) neglect to produce, after having been ordered to do so, any pertinent document; or (4) refuse to appear after having been subpenaed, or, upon appearing, refuse to take the oath as a witness, or having taken the oath, refuse to be examined according to law: *Provided*, That a person other than a bankrupt or, where the bankrupt is a corporation, its officers, or the members of its board of directors or trustees or of other similar controlling bodies, shall not be required to attend as a witness before a referee at a place more than one hundred miles from such person's place of residence or unless his lawful mileage and fee for one day's attendance shall be first paid or tendered to him.

b. The referee shall forthwith certify the facts to the judge, if any person shall do any of the things forbidden in this section, and he may serve or cause to be served upon such person an order requiring such person to appear before the judge upon a day certain to show cause why he should not be adjudged in contempt by reason of the facts so certified. The judge shall thereupon, in a summary manner, hear the evidence as to the acts complained of and, if it is such as to warrant him in so doing, punish such person in the same manner and to the same extent as for a contempt committed before him, or commit such person upon the same conditions as if the doing of the forbidden act had occurred with reference to the process of the court of bankruptcy or in the presence of the judge.

b. Any such preference may be avoided by the trustee if the creditor receiving it or to be benefited thereby or his agent acting with reference thereto has, at the time when the transfer is made, reasonable cause to believe that the debtor is insolvent. Where the preference is voidable, the trustee may recover the property or, if it has been converted, its value from any person who has received or converted such property, except a bona-fide purchaser from or lienor of the debtor's transferee for a present fair equivalent value: *Provided, however,* That where such purchaser or lienor has given less than such value, he shall nevertheless have a lien upon such property, but only to the extent of the consideration actually given by him. Where a preference by way of lien or security title is voidable, the court may on due notice order such lien or title to be preserved for the benefit of the estate, in which event such lien or title shall pass to the trustee. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

SECTION SIXTY-SEVEN (11 U.S.C. SEC. 107)

Sec. 67. Liens and Fraudulent Transfers.

a. (1) Every lien against the property of a person obtained by attachment, judgment, levy, or other legal or equitable process or proceedings within four months before the filing of a petition initiating a proceeding under this Act by or against such person shall be deemed null and void (a) if at the time when such lien was obtained such person was insolvent or (b) if such lien was sought and permitted in fraud of the provisions of this Act: *Provided, however,* That if such person is not finally adjudged a bankrupt in any proceeding under this Act and if no arrangement or plan is proposed and confirmed, such lien shall be deemed reinstated with the same effect as if it had not been nullified and voided.

(2) If any lien deemed null and void under the provisions of paragraph (1) of this subdivision a, has been dissolved by the furnishing of a bond or other obligation, the surety on which has been indemnified directly or

indirectly by the transfer of or the creation of a lien upon any of the nonexempt property of a person before the filing of a petition initiating a proceeding under this Act by or against him, such indemnifying transfer or lien shall also be deemed null and void: *Provided, however,* That if such person is not finally adjudged a bankrupt in any proceeding under this Act, and if no arrangment or plan is proposed and confirmed, such transfer or lien shall be deemed reinstated with the same effect as if it had not been nullified and voided.

(3) The property affected by any lien deemed null and void under the provisions of paragraphs (1) and (2) of this subdivision a shall be discharged from such lien, and such property and any of the indemnifying property transferred to or for the benefit of a surety shall pass to the trustee or debtor, as the case may be, except that the court may on due notice order any such lien to be preserved for the benefit of the estate, and the court may direct such conveyance as may be proper or adequate to evidence the title thereto of the trustee or debtor, as the case may be: *Provided, however,* That the title of a bona-fide purchaser of such property shall be valid, but if such title is acquired otherwise than at a judicial sale held to enforce such lien, it shall be valid only to the extent of the present consideration paid for such property.

(4) The court shall have summary jurisdiction of any proceeding by the trustee or debtor, as the case may be, to hear and determine the rights of any parties under this subdivision a. Due notice of any hearing in such proceeding shall be given to all parties in interest, including the obligee of a releasing bond or other like obligation. Where an order is entered for the recovery of indemnifying property in kind or for the avoidance of an indemnifying lien, the court, upon application of any party in interest, shall in the same proceeding ascertain the value of such property or lien, and if such value is less than the amount for which such property is indemnity or than the amount of such lien, the transferee or lienholder may elect to retain such property or lien upon payment of its value, as ascertained by the court, to the trustee or debtor, as the case may be, within such reasonable times as the court shall fix.

(5) The liability of a surety under a releasing bond or other like obligation shall be discharged to the extent of the value of the indemnifying property recovered or the indemnifying lien nullified and voided by the trustee or debtor, or, where the property is retained pursuant to the provisions of paragraph (4) of this subdivision a, to the extent of the amount paid to the trustee or debtor.

b. The provisions of section 60 of this Act to the contrary notwithstanding and except as otherwise provided in subdivision c of this section, statutory liens in favor of employees, contractors, mechanics, or any other class of persons, and statutory liens for taxes and debts owing to the United States or to any State or any subdivision thereof, created or recognized by the laws of the United States or any State, may be valid against the trustee, even though arising or perfected while the debtor is insolvent and within four months prior to the filing of the petition initiating a proceeding under this Act by or against him.

c. (1) The following liens shall be invalid against the trustee:

(A) every statutory lien which first becomes effective upon the insolvency of the debtor, or upon distribution or liquidation of his property, or upon execution against his property levied at the instance of one other than the lienor;

(B) every statutory lien which is not perfected or enforceable at the date of bankruptcy against one acquiring the rights of a bona fide purchaser from the debtor on that date, whether or not such purchaser exists: *Provided*, That where a statutory lien is not invalid at the date of bankruptcy against the trustee under subdivision c of section 70 of this Act and is required by applicable lien law to be perfected in order to be valid against a subsequent bona fide purchaser, such a lien may nevertheless be valid under this subdivision if perfected within the time permitted by and in accordance with the requirements of such law: *And provided further*, That if applicable lien law requires a lien valid against the trustee under section 70, subdivision c, to be perfected by the seizure of property, it shall instead be perfected as permitted by this subdivision c of section 67 by filing notice thereof with the court:

(C) every statutory lien for rent and every lien of distress for rent, whether statutory or not. A right of distress

for rent which creates a security interest in property shall be deemed a lien for the purposes of this subdivision c.

(2) The court may, on due notice, order any of the aforesaid liens invalidated against the trustee to be preserved for the benefit of the estate and in that event the lien shall pass to the trustee. A lien not preserved for the benefit of the estate but invalidated against the trustee shall be invalid as against all liens indefeasible in bankruptcy, so as to have the effect of promoting liens indefeasible in bankruptcy which would otherwise be subordinate to such invalidated lien. Claims for wages, taxes, and rent secured by liens hereby invalidated or preserved shall be respectively allowable with priority and restricted as are debts therefor entitled to priority under clauses (2), (4) and (5) of subdivision a of section 64 of this Act, even though not otherwise granted priority.

(3) Every tax lien on personal property not accompanied by possession shall be postponed in payment to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act. Where such a tax lien is prior in right to liens indefeasible in bankruptcy, the court shall order payment from the proceeds derived form the sale of the personal property to which the tax lien attaches, less the actual cost of that sale, of an amount not in excess of the tax lien, to the debts specified in clauses (1) and (2) of subdivsion a of section 64 of this Act. If the amount realized from the sale exceeds the total of such debts, after allowing for prior indefeasible liens and the cost of the sale, the excess up to the amount of the difference between the total paid to the debts specified in clauses (1) and (2) of subdivision a of section 64 of this Act and the amount of the tax lien, is to be paid to the holder of the tax lien.

(4) Where a penalty not allowable under subdivision j of section 57 is secured by a lien, the portion of the lien securing such penalty shall not be eligible for preservation under this subdivision c.

(5) This subdivision c shall not apply to liens enforced by sale before the filing of the petition, nor to liens against property set aside to the bankrupt as exempt, nor to liens against property abandoned by the trustee or unadministered in bankruptcy for any reason and shall not apply in proceedings under section 77 of this Act, nor in proceed-

ings under chapter X of this Act unless an order has been entered directing that bankruptcy be proceeded with.

d. (1) For the purposes of, and exclusively applicable to, this subdivision d: (a) "Property" of a debtor shall include only his nonexempt property; (b) "debt" is any legal liability, whether matured or unmatured, liquidated or unliquidated, absolute, fixed, or contingent; (c) "creditor" is a person in whose favor a debt exists; (d) a person is "insolvent" when the present fair salable value of his property is less than the amount required to pay his debts; and to determine whether a partnership is insolvent, there shall be added to the partnership property the present fair salable value of the separate property of each general partner in excess of the amount required to pay his separate debts, and also the amount realizable on any unpaid subscription to the partnership of each limited partner; and (e) consideration given for the property or obligation of a debtor is "fair" (1) when, in good faith, in exchange and as a fair equivalent therefor, property is transferred or an antecedent debt is satisfied, or (2) when such property or obligation is received in good faith to secure a present advance or antecedent debt in an amount not disproportionately small as compared with the value of the property or obligation obtained.

(2) Every transfer made and every obligation incurred by a debtor within one year prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent (a) as to creditors existing at the time of such transfer or obligation, if made or incurred without fair consideration by a debtor who is or will be thereby rendered insolvent, without regard to his actual intent; or (b) as to then existing creditors and as to other persons who become creditors during the continuance of a business or transaction, if made or incurred without fair consideration by a debtor who is engaged or is about to engage in such business or transaction, for which the property remaining in his hands is an unreasonably small capital, without regard to his actual intent; or (c) as to then existing and future creditors, if made or incurred without fair consideration by a debtor who intends to incur or believes that he will incur debts beyond his ability to pay as they mature; or (d) as to then existing and future creditors, if made or incurred with actual intent as distinguished from intent

presumed in law, to hinder, delay, or defraud either existing or future creditors.

(3) Every transfer made and every obligation incurred by a debtor who is or will thereby be rendered insolvent, within four months prior to the filing of a petition initiating a proceeding under this Act by or against him is fraudulent, as to then existing and future creditors: (a) if made or incurred in contemplation of the filing of a petition initiating a proceeding under this Act by or against the debtor or in contemplation of liquidation of all or the greater portion of the debtor's property, with intent to use the consideration obtained for such transfer or obligation to enable any creditor of such debtor to obtain a greater percentage of his debt than some other creditor of the same class, and (b) if the transferee or obligee of such transfer or obligation, at the time of such transfer or obligation, knew or believed that the debtor intended to make such use of such consideration. The remedies of the trustee for the avoidance of such transfer or obligation and of any ensuing preference shall be cumulative: *Provided, however,* That the trustee shall be entitled to only one satisfaction with respect thereto.

(4) Every transfer of partnership property and every partnership obligation incurred within one year prior to the filing of a petition initiating a proceeding under this Act by or against the partnership, when the partnership is insvolvent or will be thereby rendered insolvent, is fraudulent as to partnership creditors existing at the time of such transfer or obligation, without regard to actual intent if made or incurred (a) to a partner, whether with or without a promise by him to pay partnership debts, or (b) to a person not a partner without fair consideration to the partnership as distinguished from consideration to the individual partners.

(5) For the purposes of this subdivision d, a transfer shall be deemed to have been made at the time when it became so far perfected that no bona fide purchaser from the debtor could thereafter have acquired any rights in the property so transferred superior to the rights of the transferee therein, but, if such transfer is not so perfected prior to the filing of the petition initiating a proceeding under this Act, it shall be deemed to have been made immediately before the filing of such petition.

(6) A transfer made or an obligation incurred by a debtor adjudged a bankrupt under this Act, which is fraudulent under this subdivision d against creditors of such debtor having claims provable under this Act, shall be null and void against the trustee, except as to a bona fide purchaser, lienor, or obligee for a present fair equivalent value: *Provided, however*, That the court may, on due notice, order such transfer or obligation to be preserved for the benefit of the estate and, in such event, the trustee shall succeed to and may enforce the rights of such transferee or obligee; *And provided further*, That such purchaser, lienor, or obligee, who without actual fraudulent intent has given a consideration less than fair, as defined in this subdivision d, for such transfer, lien, or obligation, may retain the property, lien, or obligation as security for repayment.

(7) Nothing contained in this subdivision d shall be construed to validate a transfer which is voidable under section 60 of this Act.

e. For the purpose of any recovery or avoidance under this section, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankruptcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

f. (1) For the purposes of, and exclusively applicable to, this subdivision f(a) "debtor" shall mean a face-amount certificate company as defined in section 4 of the Investment Company Act of 1940; (b) "face-amount certificate" shall mean a face-amount certificate as defined in section 2 of the Investment Company Act of 1940; (c) "depositary" is a person or State agency with whom securities or other property of a debtor is deposited or to whom property of a debtor is transferred, in trust or otherwise, pursuant to the requirements of a State law or an agreement by the debtor providing for the distribution of such property or its proceeds to creditors or security holders of the debtor in the event of the insolvency of the debtor or under other specified circumstances; (d) "deposit creditor" is a creditor who, under the provisions of a State law or agreement providing for a deposit with or transfer to a depositary, has rights as to the securities or property so deposited or transferred which exceed the rights of a general creditor; and (e) "State agency" is an official or agency of a State desig-

nated to act as depositary or to distribute property, or the proceeds of property held by a depositary.

(2) Every deposit or transfer of securities or other property made by or on behalf of a debtor with or to any depositary for the benefit or protection of or to secure the holder of any security sold by or on behalf of the debtor on or after January 1, 1941, shall be voidable as against the trustee of such debtor if the property of the estate is insufficient for the full payment and discharge of all claims on account of all face-amount certificates sold by or on behalf of the debtor, and such deposit or transfer and every lien created thereby shall thereupon be avoided by the trustee subject to the provisions of paragraph 3 of this subdivision f.

(3) In the event any deposit or transfer described in paragraph 2 of this subdivision f shall be avoided the trustee shall segregate the property received by the trustee from the depositary and charge the same with the cost and expenses of maintenance and liquidation and distribute the net proceeds thereof to the creditors who would have been entitled thereto under the provisions of the law or agreement providing for the deposit or transfer of the property, and each such creditor shall thereafter be entitled to dividends from the estate only after all creditors of the same rank shall have received the same percentage.

(4) The court shall have summary jurisdiction of any proceedings to hear and determine the rights of any parties under this subdivision f and to hear and determine the sufficiency of the property of the estate for the full payment and discharge of all claims on account of all face-amount certificates sold by or on behalf of the debtor. Due notice of any hearing in such proceedings shall be given to every depositary and State agency which is a party in interest.

(5) Where the provisions of subsection (c) of section 28 are not applicable, the provisions of this section will not apply.

SECTION SEVENTY

Sec. 70. Title to Property.

a. The trustee of the estate of a bankrupt and his successor or successors, if any, upon his or their appoint-

ment and qualification, shall in turn be vested by operation of law with the title of the bankrupt as of the date of the filing of the petition initiating a proceeding under this Act, except insofar as it is to property which is held to be exempt, to all of the following kinds of property wherever located (1) documents relating to his property; (2) interests in patents, patent rights, copyrights, and trade-marks, and in applications therefor: *Provided*, That in case the trustee, within thirty days after appointment and qualification, does not notify the applicant for a patent, copyright, or trade-mark of his election to prosecute the application to allowance or rejection, the bankrupt may apply to the court for an order revesting him with the title thereto, which petition shall be granted unless for cause shown by the trustee the court grants further time to the trustee for making such election; and such applicant may, in any event, at any time petition the court to be revested with such title in case the trustee shall fail to prosecute such application with reasonable diligence; and the court, upon revesting the bankrupt with such title, shall direct the trustee to execute proper instruments of transfer to make the same effective in law and upon the records; (3) powers which he might have exercised for his own benefit, but not those which he might have exercised solely for some other person; (4) property transferred by him in fraud of his creditors; (5) property, including rights of action, which prior to the filing of the petition he could by any means have transferred or which might have been levied upon and sold under judicial process against him, or otherwise seized, impounded, or sequestered; *Provided*, that rights of action ex delicto for libel, slander, injuries to the person of the bankrupt or of a relative, whether or not resulting in death, seduction, and criminal conversation shall not vest in the trustee unless by the law of the State such rights of action are subject to attachment, execution, garnishment, sequestration, or other judicial process; *And provided further*, That when any bankrupt, who is a natural person, shall have any insurance policy which has a cash surrender value payable to himself, his estate, or personal representatives, he may, within thirty days after the cash surrender value has been ascertained and stated to the trustee by the company issuing the same, pay or secure to the trustee the sum so ascertained and stated, and con-

tinue to hold, own, and carry such policy free from the claims of the creditors participating in the distribution of his estate under the bankruptcy proceedings, otherwise the policy shall pass to the trustee as assets; (6) rights of action arising upon contracts, or usury, or the unlawful taking or detention of or injury to his property; (7) contingent remainders, executory devises and limitations, rights of entry for condition broken, rights or possibilities of reverter, and like interests in real property, which were nonassignable prior to bankruptcy and which, within six months thereafter, become assignable interests or estates or give rise to powers in the bankrupt to acquire assignable interests or estates; and (8) property held by an assignee for the benefit of creditors appointed under an assignment which constituted an act of bankruptcy, which property shall, for the purposes of this Act, be deemed to be held by the assignee as the agent of the bankrupt and shall be subject to the summary jurisdiction of the court.

All property, wherever located, except insofar as it is property which is held to be exempt, which vests in the bankrupt within six months after bankruptcy by bequest, devise or inheritance shall vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date when it vested in the bankrupt, and shall be free and discharged from any transfer made or suffered by the bankrupt after bankruptcy.

All property, wherever located, except insofar as it is property which is held to be exempt, in which the bankrupt has at the date of bankruptcy an estate or interest by the entirety and which within six months after bankruptcy becomes transferable in whole or in part solely by the bankrupt shall, to the extent it becomes so transferable, vest in the trustee and his successor or successors, if any, upon his or their appointment and qualification, as of the date of bankruptcy.

The title of the trustee shall not be affected by the prior possession of a receiver or other officer of any court.

b. The trustee shall assume or reject an executory contract, including an unexpired lease of real property, within sixty days after the adjudication or within thirty days after the qualification of the trustee, whichever is later, but the court may for cause shown extend or reduce the time. Any such contract or lease not assumed or rejected

within that time shall be deemed to be rejected. If the trustee is not appointed, any such contract or lease shall be deemed to be rejected within thirty days after the date of the order directing that a trustee be not appointed. A trustee shall file, within sixty days after adjudication or within thirty days after he has qualified, whichever is later, unless the court for cause shown extends or reduces the time, a statement under oath showing which, if any, of the contracts of the bankrupt are executory in whole or in part, including unexpired leases of real property, and which, if any, have been rejected by the trustee. Unless a lease of real property expressly otherwise provides, a rejection of the lease or of any convenant therein by the trustee of the lessor does not deprive the lessee of his estate. A general covenant or condition in a lease that it shall not be assigned shall not be construed to prevent the trustee from assuming the same at his election and subsequently assigning the same; but an express covenant that an assignment by operation of law or the bankruptcy of a specified party thereto or of either party shall terminate the lease or give the other party an election to terminate the same is enforceable. A trustee who elects to assume a contract or lease of the bankrupt and who subsequently, with the approval of the court and upon such terms and conditions as the court may fix after hearing upon notice to the other party to the contract or lease, assigns the contract or lease to a third person, is not liable for breaches occurring after the assignment.

c. The trustee may have the benefit of all defenses available to the bankrupt as against third persons, including statutes of limitation, statutes of frauds, usury, and other personal defenses; and a waiver of any such defense by the bankrupt after bankruptcy shall not bind the trustee. The trustee shall have as of the date of bankruptcy the rights and powers of: (1) a creditor who obtained a judgment against the bankrupt upon the date of bankruptcy, whether or not such a creditor exists, (2) a creditor who upon the date of bankruptcy obtained an execution returned unsatisfied against the bankrupt, whether or not such a creditor exists, and (3) a creditor who upon the date of bankruptcy obtained a lien by legal or equitable proceedings upon all property, whether or not coming into possession or control of the court, upon which a creditor of

the bankrupt upon a simple contract could have obtained such a lien, whether or not such a creditor exists. If a transfer is valid in part against creditors whose rights and powers are conferred upon the trustee under this subdivision, it shall be valid to a like extent against the trustee. In cases where repugnancy or inconsistency exists with reference to the rights and powers in this subdivision conferred, the trustee may elect which rights and powers to exercise with reference to a particular party, a particular remedy, or a particular transaction, without prejudice to his right to maintain a different position with reference to a different party, a different remedy, or a different transaction.

d. After bankruptcy and either before adjudication or before a receiver takes possession of the property of the bankrupt, whichever first occurs —

(1) A transfer of any of the property of the bankrupt, other than real estate, made to a person acting in good faith shall be valid against the trustee if made for a present fair equivalent value or, if not made for a present fair equivalent value, then to the extent of the present consideration actually paid therefor, for which amount the transferee shall have a lien upon the property so transferred;

(2) A person indebted to the bankrupt or holding property of the bankrupt may, if acting in good faith, pay such indebtedness or deliver such property, or any part thereof, to the bankrupt or upon his order, with the same effect as if the bankruptcy were not pending;

(3) A person having actual knowledge of such pending bankruptcy shall be deemed not to act in good faith unless he has reasonable cause to believe that the petition in bankruptcy is not well founded;

(4) The provisions of paragraphs (1) and (2) of this subdivision shall not apply where a receiver or trustee appointed by a United States or State court is in possession of all or the greater portion of the nonexempt property of the bankrupt;

(5) A person asserting the validity of a transfer under this subdivision shall have the burden of proof. Except as otherwise provided in this subdivision and in subdivision g of section 21 of this Act, no transfer by or in behalf of the bankrupt after the date of bankruptcy shall be valid

against the trustee; *Provided, however,* That nothing in this Act shall impair the negotiability of currency or negotiable instruments.

e. (1) A transfer made or suffered or obligation incurred by a debtor adjudged a bankrupt under this Act which, under any Federal or State law applicable thereto, is fraudulent as against or avoidable for any other reason by any creditor of the debtor, having a claim provable under this Act, shall be null and void as against the trustee of such debtor.

(2) All property of the debtor affected by any such transfer shall be and remain a part of his assets and estate, discharged and released from such transfer and shall pass to, and every such transfer or obligation shall be avoided by, the trustee for the benefit of the estate: *Provided, however,* That the court may on due notice order such transfer or obligation to be preserved for the benefit of the estate and in such event the trustee shall succeed to and may enforce the rights of such transferee or obligee. The trustee shall reclaim and recover such property or collect its value from and avoid such transfer or obligation against whoever may hold or have received it, except a person as to whom the transfer or obligation specified in paragraph (1) of this subdivision e is valid under applicable Federal or State laws.

(3) For the purpose of such recovery or of the avoidance of such transfer or obligation, where plenary proceedings are necessary, any State court which would have had jurisdiction if bankrutpcy had not intervened and any court of bankruptcy shall have concurrent jurisdiction.

f. The court shall appoint a competent and disinterested appraiser and upon cause shown may appoint additional appraisers, who shall appraise all the items of real and personal property belonging to the bankrupt estate and who shall prepare and file with the court their report thereof. Real and personal property shall, when practicable, be sold subject to the approval of the court. It shall not be sold otherwise than subject to the approval of the court for less than 75 per centum of its appraised value. Whenever a sale of real or personal property of a bankrupt is made by or through an auctioneer employeed by the court, receiver, or trustee, the auctioneer must be a duly

licensed or authorized auctioneer in the place where the sale is to be conducted.

g. The title to property of a bankrupt estate which has been sold, as herein provided, shall be conveyed to the purchaser by the trustee.

i. Upon the confirmation of an arrangement or plan, or at such later time as may be provided by the arrangement or plan, or in the order confirming the arrangement or plan, the title to the property dealt with shall revest in the bankrupt or debtor, or vest in such other person as may be provided by the arrangement or plan or in the order confirming the arrangment or plan.

28 U.S.C. SEC. 1481

Sec. 1481. Powers of bankruptcy court.

A bankruptcy court shall have the powers of a court of equity, law, and admiralty, but may not enjoin another court or punish a criminal contempt not committed in the presence of the judge or the court or warranting a punishing of imprisonment.

18 U.S.C. SEC. 401

Sec. 401. Power of court.

A court of the United States shall have power to punish by fine or imprisonment, at its discretion, such contempt of its authority, and none other, as —

(1) Misbehavior of any person in its presence or so near thereto as to obstruct the administration of justice;

(2) Misbehavior of any of its officers in their official transactions;

(3) Disobedience or resistance to its lawful writ, process, order, rule, decree, or command. June 25, 1948, c. 645, 62 Stat. 701.

18 U.S.C. SEC. 402

Sec. 402. Contempts constituting crimes.

Any person, corporation or association willfully disobeying any awful writ, process, order, rule, decree, or command of any district court of the United State or any court of the District of Columbia, by doing any act or thing therein, or thereby forbidden, if the act or thing so done be

of such character as to constitute also a criminal offense under any statute of the United States or under the laws of any State in which the act was committed, shall be prosecuted for such contempt as provided in section 3691 of this title and shall be punished by fine or imprisonment, or both.

Such fine shall be paid to the United States or to the complainant or other party injured by the act constituting the contempt, or may, where more than one is so damaged, be divided or apportioned among them as the court may direct, but in no case shall the fine to be paid to the United States exceed, in case the accused is a natural person, the sum of $1,000, nor shall such imprisonment exceed the term of six months.

This section shall not be construed to relate to contempts committed in the presence of the court, or so near thereto as to obstruct the administration of justice, nor to contempts committed in disobedience of any lawful writ, process, order, rule, decree, or command entered in any suit or action brought or prosecuted in the name of, or on behalf of, the United States, but the same, and all other cases of contempt not specifically embraced in this section may be punished in conformity to the prevailing usages at law. June 25, 1948, c. 645, 62 Stat. 701; May 24, 1949, c. 139, Sec. 8(c), 63 Stat. 90.

UNIFORM COMMERCIAL CODE
SECTION 1-103
GEORGIA CODE ANNOTATED
SECTION 109A-1-103

109A-1-103 Supplementary general principles of law applicable.

Unless displaced by the particular provisions of this Act, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, or other validating or invalidating cause shall supplement its provisions.

109A-1-203 Obligation of good faith.

Every contract or duty within this Act imposes an obligation of good faith in its performance or enforcement.

(Acts 1962, pp. 156, 168.)

CANON 1

A Judge Should Uphold the Integrity and Independence of the Judiciary

An independent and honorable judiciary is indispensable to justice in our society. A judge should participate in establishing, maintaining, and enforcing, and should himself observe, high standards of conduct so that the integrity and independence of the judiciary may be preserved. The provisions of this Code should be construed and applied to further that objective.

CANON 2

A Judge Should Avoid Impropriety and the Appearance of Impropriety in All His Activities

A. A judge should respect and comply with the law and should conduct himself at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

B. A judge should not allow his family, social, or other relationships to influence his judicial conduct or judgment. He should not lend the prestige of his office to advance the private interests of others; nor should he convey or permit others to convey the impression that they are in a special position to influence him. He should not testify voluntarily as a character witness.

Commentary: Public confidence in the judiciary is eroded by irresponsible or improper conduct by judges. A judge must avoid all impropriety and appearance of impropriety. He must expect to be the subject to constant public scrutiny. He must therefore accept restrictions on his conduct that might be viewed as burdensome by the ordinary citizen and should do so freely and willingly.

The testimony of a judge as a character witness injects the prestige of his office into the proceeding in which he testifies and may be misunderstood to be an official testimonial. This Canon, however, does not afford him a privilege against testifying in response to an official summons.

CANON 3

A Judge Should Perform the Duties of His office Impartially and Diligently

The judicial duties of a judge take precedence over all his other activities. His judicial duties include all the duties of his office prescribed by law. In the performance of these duties, the following standards apply:

A. Adjudicative Responsibilities.

(1) A judge should be faithful to the law and maintain professional competence in it. He should be unswayed by partisan interests, public clamor, or fear of criticism.

(2) A judge should maintain order and decorum in proceedings before him.

(3) A judge should be patient, dignified, and courteous to litigants, jurors, witnesses, lawyers, and others with whom he deals in his official capacity, and should require similar conduct of lawyers, and of his staff, court officials, and others subject to his direction and control.

Commentary: The duty to hear all proceedings fairly and with patience is not inconsistent with the duty to dispose promptly of the business of the court. Courts can be efficient and business-like while being patient and deliberate.

(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

Commentary: The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceedings, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

An appropriate and often desirable procedure for a court

to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief *amicus curiae.*

(5) A judge should dispose promptly of the business of the court.

Commentary: Prompt disposition of the court's business requires a judge to devote adequate time to his duties, to be punctual in attending court and expeditious in determining matters under submission, and to insist that court officials, litigants and their lawyers cooperate with him to that end.

(6) A judge should abstain from public comment about a pending or impending proceeding in any court, and should require similar abstention on the part of court personnel subject to his direction and control. This subsection does not prohibit judges from making public statements in the course of their official duties or from explaining for public information the procedures of the court.

Commentary: "Court personnel" does not include the lawyers in a proceeding before a judge. The conduct of lawyers is governed by DR7-107 of the *Code of Professional Responsibility.*

(7) A judge should prohibit broadcasting, televising, recording, or taking photographs in the courtroom and areas immediately adjacent thereto during sessions of court or recess between sessions, except that a judge may authorize:

(a) the use of electronic or photographic means for the presentation of evidence, for the perpetuation of a record, or for other purposes of judicial administration;

(b) the broadcasting, television, recording, or photographing of investitive, ceremonial, or naturalization proceedings;

(c) the photographic or electronic recording and reproduction of appropriate court proceedings under the following conditions:

(i) the means of recording will not distract participants or impair the dignity of the proceedings;

(ii) the parties have consented, and the consent to being depicted or recorded has been obtained from each witness appearing in the recording and reproduction;

(iii) the reproduction will not be exhibited until after the proceeding has been concluded and all direct appeals have been exhausted; and

(iv) the reproduction will be exhibited only for instructional purposes in educational institutions.

Commentary: Temperate conduct of judicial proceedings is essential to the fair administration of justice. The recording and reproduction of a proceeding should not distort or dramatize the proceeding.

B. Administrative Responsibilities

(1) A judge should diligently discharge his administrative responsibilities, maintain professional competence in judicial administration, and facilitate the performance of the administrative responsibilities of other judges and court officials.

(2) A judge should require his staff and court officials subject to his direction and control to observe the standards of fidelity and diligence that apply to him.

(3) A judge should take or initiate appropriate disciplinary measures against a judge or lawyer for unprofessional conduct of which the judge may become aware.

Commentary: Disciplinary measures may include reporting a lawyer's misconduct to an appropriate disciplinary body.

(4) A judge should not make unnecessary appointments. He should exercise his power of appointment only on the basis of merit, avoiding nepotism and favoritism. He should not approve compensations of appointees beyond the fair value of services rendered.

Commentary: Appointees of the judge include officials such as referees, commissioners, special masters, receivers, guardians and personnel such as clerks, secretaries, and bailiffs. Consent by the parties to an appointment or an award of compensation does not relieve the judge of the obligation prescribed by this subsection.

C. Disqualification

(1) A judge should disqualify himself in a proceeding in which his impartiality might reasonably be questioned, including but not limited to instances where:

(a) he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;

(b) he served as lawyer in the matter in controversy, or

a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;

Commentary: A lawyer in a governmental agency does not necessarily have an association with other lawyers employed by that agency within the meaning of this subsection; a judge formerly employed by a governmental agency, however, should disqualify himself in a proceeding if his impartiality might reasonably be questioned because of such association.

(c) he knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;

(d) he or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:

(i) is a party to the proceeding, or an officer, director, or trustee of a party;

(ii) is acting as a lawyer in the proceeding;

Commentary: The fact that a lawyer in a proceeding is affiliated with a law firm with which a lawyer-relative of the judge is affiliated does not of itself disqualify the judge. Under appropriate circumstances, the fact that "his impartiality might reasonably be questioned" under Canon 3C(1), or that the lawyer-relative is known by the judge to have an interest in the law firm that could be "substantially affected by the outcome of the proceeding" under Canon 3C(1)(d)(iii) may require his disqualification.

(iii) is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;

(iv) is to the judge's knowledge likely to be a material witness in the proceeding;

(2) A judge should inform himself about his personal and fiduciary financial interests, and make a reasonable effort to inform himself about the personal financial interests of his spouse and minor children residing in his household.

(3) For the purposes of this section:

(a) the degree of relationship is calculated according to the civil law system;

Commentary: According to the civil law system, the third degree of relationship test would, for example, disqualify the judge if his or his spouse's father, grandfather, uncle, brother, or niece's husband were a party or lawyer in the proceeding, but would not disqualify him if a cousin were a party or lawyer in the proceeding.

(b) "fiduciary" includes such relationships as executor, adminstrator, trustee, and guardian;

(c) "financial interest" means ownership of a legal or equitable interest, however small, or a relationship as director, advisor, or other active participant in the affairs of a party, except that:

(i) ownership in a mutual or common investment fund that holds securities is not a "financial interest" in such securities unless the judge participates in the management of the fund;

(ii) an office in an educational, religious, charitable, fraternal, or civil organization is not a "financial interest" in securities held by the organization;

(iii) the proprietary interest of a policy holder in a mutual insurance company, of a depositor in a mutual savings association, or a similar proprietary interest, is a "financial interest" in the organization only if the outcome of the proceedings could substantially affect the value of the interest;

(iv.) ownership of government securities is a "financial interest" in the issuer only if the outcome of the proceedings could substantially affect the value of the securities.

D. Remittal of Disqualification.

A judge disqualified by the terms of Canon 3C(1) (c) or Canon 3C(1) (d) may, instead of withdrawing from the proceeding, disclose on the record the basis of his disqualification. If, based on such disclosure, the parties and lawyers, independently of the judge's participation, all agree in writing that the judge's relationship is immaterial or that his financial interest is insubstantial, the judge is no longer disqualified, and may participate in the proceeding. The agreement, signed by all parties and lawyers, shall be incorporated in the record of the proceeding.

Commentary: This procedure is designed to minimize the chance that a party or lawyer will feel coerced into an agreement. When a party is not immediately available,

the judge without violating this section may proceed on the written assurance of the lawyer that his party's consent will be subsequently filed.

CANON 4

A Judge May Engage in Activities to Improve the Law, the Legal System, and the Administration of Justice

A judge, subject to the proper performance of his judicial duties, may engage in the following quais-judicial activities, if in doing so he does not cast doubt on his capacity to decide impartially any issue that may come before him:

A. He may speak, write, lecture, teach, and participate in other activities concerning the law, the legal system, and the administration of justice.

B. He may appear at a public hearing before an executive or legislative body or official on matters concerning the law, the legal system, and the administration of justice, and he may otherwise consult with an executive or legislative body or official, but only on matters concerning the administration of justice.

C. He may serve as a member, officer, or director of an organization or governmental agency devoted to the improvement of the law, the legal system, or the adminstration of justice. He may assist such an organization in raising funds and may participate in their management and investment, but should not personally participate in public fund raising activities. He may make recommendations to public and private fund-granting agencies on projects and programs concerning the law, the legal system, and the adminstration of justice.

Commentary: As a judicial officer and person specially learned in the law, a judge is in a unique position to contribute to the improvement of the law, the legal system, and the adminstration of justice, including revision of substantive and procedural law and improvement of criminal and juvenile justice. To the extent that his time permits, he is encouraged to do so, either independently or through a bar association, judicial conference, or other organization dedicate to the improvement of the law.

Extra-judicial activities are governed by Canon 5.

CANON 5

A Judge Should Regulate His Extra-Judicial Activities to Minimize the Risk of Conflict with His Judicial Duties.

A. Avocational Activities.

A judge may write, lecture, teach, and speak on non-legal subjects, and engage in the arts, sports, and other social and recreational activities, if such avocational activities do not detract from the dignity of his office or interfere with the performance of his judicial duties.

Commentary: Complete separation of a judge from extra-judicial activities is neither possible nor wise; he should not become isolated from the society in which he lives.

B. Civic and Charitable Activities.

A judge may participate in civic and charitable activities that do not reflect adversely upon his impartiality or interfere with the performance of his judicial duties. A judge may serve as an officer, director, trustee, or non-legal advisor of an educational, religious, charitable, fraternal, or civic organization not conducted for the economic or political advantage of its members, subject to the following limitations:

(1) A judge should not serve if it is likely that the organization will be engaged in proceedings that would ordinarily come before him or will be regularly engaged in adversary proceedings in any court.

Commentary: The changing nature of some organizations and of their relationship to the law makes it necessary for a judge regularly to re-examine the activities of each organization with which he is affiliated to determine if it is proper for him to continue his relationship with it. For example, in many jurisdictions charitable hopsitals are now more frequently in court than in the past. Similarly, the boards of some legal aid organizations now make policy decisions that may have political significance or imply commitment to causes that may come before the courts for adjudication.

(2) A judge should not solicit funds for any educational, religious, charitable, fraternal, or civic organization, or use or permit the use of the prestige of his office for that purpose, but he may be listed as an officer, director, or trustee of such an organization. He should not be a speaker

or the guest of honor at an organization's fund raising events, but he may attend such events.

(3) A judge should not give investment advice to such an organization, but he may serve on its board of directors or trustees even through it has the responsibility for approving investment decisions.

Commentary: A judge's participation in an organization devoted to quasi-judicial activities is governed by Canon 4.

C. Financial Activities.

(1) A judge should refrain from financial and business dealings that tend to reflect adversely on his impartiality, interfere with the proper performance of his judicial duties, exploit his judicial position, or involve him in frequent transactions with lawyers or persons likely to come before the court on which he serves.

(2) Subject to the requirements of subsection (1), a judge may hold and manage investments, including real estate and engage in other remunerative activity including the operation of a business.

(3) A judge should manage his investments and other financial interests to minimize the number of cases in which he is disqualified. As soon as he can do so without serious financial detriment, he should divest himself of investments and other financial interests that might require frequent disqualification.

(4) Neither a judge nor a member of his family residing in his household should accept a gift, bequest, favor, or loan from anyone except as follows:

(a) a judge may accept a gift incident to a public testimonial to him; books supplied by publishers on a complimentary basis for official use; or an invitation to the judge and his spouse to attend a bar-related function or activity devoted to the improvement of the law, the legal system, or the adminsitration of justice;

(b) a judge or a member of his family residing in his household may accept ordinary social hospitality; a gift, bequest, favor, or loan from a relative, a wedding or engagement gift, a loan from a lending institution in its regular course of business on the same terms generally available to persons who are not judges, or a scholarship or fellowship awarded on the same terms applied to other applicants;

(c) a judge or a member of his family residing in his household may accept any other gift, bequest, favor, or loan only if the donor is not a party or other person whose interests have come or are likely to come before him, and if its value exceeds $100, the judge reports it in the same manner as he reports compensation in Canon 6C.

Commentary: This subsection does not apply to contributions to a judge's campaign for judicial office, a matter governed by Canon 7.

(5) For the purposes of this section "member of his family residing in his household" means any relative of a judge by blood or marriage, or a person treated by a judge as a member of his family, who resides in his household.

(6) A judge is not required by this Code to disclose his income, debts, or investments, except as provided in this Canon and Canons 3 an 6.

Commentary: Canon 3 requires a judge to disqualify himself in any proceeding in which he has a financial interest, however small; Canon 5 requires a judge to refrain from financial activities that might interfere with the impartial performance of his judicial duties; Canon 6 requires him to report all compensation he receives for activities involving personal services outside his judicial office. A judge has the rights of an ordinary citizen, including the right to privacy of his financial affairs, except to the extent that limitations thereon are required to safeguard the proper performance of his duties. Owning and receiving income from investments do not as such affect the performance of a judge's duties.

(7) Information acquired by a judge in his judicial capacity should not be used or disclosed by him in financial dealings or for any other purpose not related to his judicial duties.

D. Fiduciary Activities.

A judge should not serve as the executor, administrator, trustee, guardian, or other fiduciary, except for the estate, trust, or person of a member of his family, and then only if such service will not interfere with the proper performance of his judicial duties. "Member of his family" includes a spouse, child, grandchild, parent, grandparent, or other relative or person with whom the judge maintains a close familial relationship. As a family fiduciary a judge is subject to the following restrictions:

(1) He should not serve if it is likely that as a fiduciary he will be engaged in proceedings that would ordinarily come before him, or if the estate, trust, or ward becomes involved in adversary proceedings in the court on which he serves or one under its appellate jurisdiction.

Commentary: The Effective Date of Compliance provision of this Code qualifies this subsection with regard to a judge who is an executor, administrator, trustee, or other fiduciary at the time this Code become effective.

(2) While acting as a fiduciary a judge is subject to the same restrictions on financial activities that apply to him in his personal capacity.

Commentary: A judge's obligation under this Canon and his obligation as a fiduciary may come into conflict. For example, a judge should resign as trustee if it would result in detriment to the trust to divest it of holdings whose retention would place the judge in violation of Canon 5C(3).

E. Arbitraton.

A judge should not act as an arbitrator or mediator.

F. Practice of Law.

A judge should not practice law.

G. Extra-judicial Appointments.

A judge should not accept apppointment to a governmental committee, commission, or other position that is concerned with issues of fact or policy on matters other than the improvement of the law, the legal system, or the administration of justice. A judge, however, may represent his country, state, or locality on ceremonial occasions or in connection with historial, educational, and cultural activities.

Commentary: Valuable services have been rendered in the past to the states and the nation by judges appointed by the executive to undertake important extra-judicial assignments. The appropriateness of conferring these assignments on judges must be reassessed, however, in light of the demands on judicial manpower created by today's crowded dockets and the need to protect the courts from involvement in extra-judicial matters that may prove to be controversial. Judges should not be expected or permitted to accept governmental appointments that could interfere with the effectiveness and independence of the judiciary.

CANON 6

A Judge Should Regularly File Reports of Compensation Received for Quasi-Judicial and Extra-Judicial Activities

A judge may receive compensation and reimbursement of expenses for the quasi-judicial and extra-judicial activities permitted by this Code, if the source of such payments does not give the appearance of influencing the judge in his judicial duties or otherwise give the appearance of impropriety, subject to the following restrictions:

A. Compensation. Compensation should not exceed a reasonable amount nor should it exceed what a person who is not a judge would receive for the same activity.

B. Expense Reimbursement. Expense reimbursement should be limited to the actual cost of travel, food, and lodging and other necessary expense reasonably incurred by the judge and, where appropriate to the occasion, by his spouse. Any payment in excess of such an amount is compensation.

C. Reports. A judge should report the date, place, and nature of any activity involving personal services for which he received compensation, and the name of the payor and the amount of compensation so received. Compensation or income of a spouse attributed to the judge by operation of a community property law is not extra-judicial compensation to the judge. His report for each calendar year should be filed between January first and April fifteenth of the following year in the office of the Clerk of the Supreme Court of Georgia. Such report shall be filed under seal and shall be available for inspection only by the Justices of the Supreme Court of Georgia and the members of the Judicial Qualifications Commission.

CANON 7

A Judge Should Refrain from Political Activity Inappropriate to His Judicial Office.

A. Political Conduct in General.

(1) A judge or a candidate for election to judicial office should not:

(a) act as a leader or hold any office in a political organization;

(b) make speeches for a political organization or candidate or publicly endorse a candidate for public office:

Commentary: A candidate does not publicly endorse another candidate for public office by having his name on the same ticket.

(c) solicit funds for or pay an assessment or make a contribution to a political organization or candidate, attend political gatherings, or purchase tickets for political party dinners, or other functions, except as authorized in subsection A(2).

(2) A judge holding an office filled by public election between competing candidates, or a candidate for such office, may, only insofar as permitted by law, attend political gatherings, speak to such gatherings on his own behalf when he is a candidate for election or re-election, identify himself as a member of a political party, and contribute to a political party or organization.

(3) A judge should resign his office when he becomes a candidate either in a party primary or in a general election for a non-judicial office, except that he may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so.

(4) A judge should not engage in any other political activity except on behalf of measures to improve the law, the legal system, or the administration of justice.

B. Campaign Conduct.

(1) A candidate, including an incumbent judge, for a judicial office that is filled either by public election between competing candidates or on the basis of a merit system election:

(a) should maintain the dignity appropriate to judicial office, and should encourage members of his family to adhere to the same standards of political conduct that apply to him;

(b) should prohibit public officials or employees subject to his direction or control from doing for him what he is prohibited from doing under this Canon; and except to the extent authorized under subsection B(2) or B(3), he should not allow any other person to do for him what he is prohibited from doing under this Canon;

(c) should not make pledges or promises of conduct in office other than the faithful and impartial performance of the duties of the office; announce his views on disputed legal or political issues; or misrepresent his identity, qualifications, present position, or other fact.

(2) A candidate, including an incumbent judge, for a judicial office that is filled by public election between competing candidates should not himself solicit or accept campaign funds, or solicit publicly stated support, but he may establish committees of responsible persons to secure and manage the expenditure of funds for his campaign and to obtain public statements of support for his candidacy. Such commitees are not prohibited from soliciting campaign contributions and public support from lawyers. A candidate's committees may solicit funds for his campaign no earlier than six (6) months before a primary election and no later than the date of the last election in which he participates during the election year. A candidate should not use or permit the use of campaign contributions for the private benefit of himself or members of his family.

Commentary: Unless the candidate is required by law to file a list of his campaign contributions, their names should not be revealed to the candidate.

(3) An incumbent judge who is a candidate for retention in or re-election to office without a competing candidate, and whose candidacy has drawn active opposition, may campaign in response thereto and may obtain publicly stated support and campaign funds in the manner provided in subsection B(2).

Compliance with the Code of Judicial Conduct

Anyone, whether or not a lawyer, who is an officer of a judicial system performing judicial functions, including an officer such as a referee in bankruptcy, special master, court commissioner, or magistrate, is a judge for the purpose of this Code. All judges should comply with this Code except as provided below.

A. Part-time Judge. A part-time judge is a judge who serves on a continuing or periodic basis, but is permitted by law to devote time to some other profession or occupation and whose compensation for that reason is less than that of a full-time judge. A part-time judge:

(1) is not required to comply with Canon 5D, E. F, and G "and is not required to comply with Canon 6C except as to compensation received for activity involving personal services other than the practice of law."

(2) should not practice law in the court on which he serves or in any court subject to the appellate jurisdiction of the court on which he serves, or act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

B. Judge Pro Tempore. A judge *pro tempore* is a person who is appointed to act temporariiy as a judge.

(1) While acting as such, a judge *pro tempore* is not required to comply with Canon 5C(3), D, E, F, and G, and Canon 6C.

(2) A person who has been judge *pro tempore* should not act as a lawyer in a proceeding in which he has served as a judge or in any other proceeding related thereto.

Effective Date of Compliance

A person to whom this Code becomes applicable should arrange his affairs as soon as reasonably possible to comply with it. If, however, the demands on his time and the possibility of conflicts of interest are not substantial, a person who holds judicial office on the date this Code becomes effective may continue to act as an executor, administrator, trustee, or other fidiciary for the estate or person of one who is not a member of his family.

CANONS OF JUDICIAL ETHICS

JUDICIAL CANON 16. EX PARTE APPLICATIONS. A judge should discourage *ex parte* hearings of applications for injunctions and receiverships where the order may work detriment to absent parties; he should act upon such *ex parte* applications only where the necessity for quick action is clearly shown; if this be demonstrated, then he should endeavor to counteract the effect of the absence of opposing counsel by a scrupulous cross examination and investigation as to the facts and the principles of law on which the application is based,

granting relief only when fully satisfied that the law permits it and the emergency demands it. He should remember that an injunction is a limitation upon the freedom of action of defendants and should not be granted lightly or inadvisedly. One applying for such relief must sustain the burden of showing clearly its necessity and this burden is increased in the absence of the party whose freedom of action is sought to be restrained even though only temporarily.

JUDICIAL CANON 17. EX PARTE COMMUNICATIONS. A judge should not permit private interviews, arguments or communications designed to influence his judicial action, where interests to be affected thereby are not represented before him, except in cases where provision is made by law for *ex parte* application.

While the conditions under which briefs of argument are to be received are largely matters of local rule or practice, he should not permit the contents of such briefs presented to him to be concealed from opposing counsel. Ordinarily all communications of counsel to the judge intended or calculated to influence action should be made known to opposing counsel.

JUDICIAL CANON 33. SOCIAL RELATIONS. It is not necessary to the proper performance of judicial duty that a judge should live in retirement or seclusion; it is desirable that, so far as reasonable attention to the completion of his work will permit, he continue to mingle in a social intercourse, and that he should not discontinue his interest in or appearance at meetings of members of the Bar. He should, however, in pending or prospective litigation before him be particularly careful to avoid such action as may reasonably tend to awaken the suspicion that his social or business relationships or friendships constitute an element in influencing his judicial conduct.

EC 1-4

The integrity of the profession can be maintained only if conduct of lawyers in violation of the Disciplinary Rules is brought to the attention of the proper officials. A lawyer should reveal voluntarily to those officials all unprivileged knowledge of conduct of lawyers which he believes clearly to be in violation of the Disciplinary

Rules. A lawyer should, upon request, serve on and assist committees and boards having responsibility for the administration of the Disciplinary Rules.

DR 1-102 — Misconduct.

(A) A laywer shall not:

(1) violate a Disciplinary Rule;

(2) circumvent a Disciplinary Rule through actions of another;

(3) engage in illegal professional conduct involving moral turpitude;

(4) engage in professional conduct involving dishonesty, fraud, deceit, or misrepresentation;

(5) engage in professional conduct that is prejudicial to the administration of justice;

(6) engage in any other professional conduct that adversely reflects on his fitness to practice law.

EC 7-35

All litigants and lawyers should have access to tribunals on an equal basis. Generally, in adversary proceedings a laywer should not communicate with a judge relative to a matter pending before, or which is to be brought before, a tribunal over which he presides in circumstances which might have the effect or give the appearance of granting undue advantage to one party. For example, a lawyer should not communicate with a tribunal by a writing unless a copy thereof is promptly delivered to opposing counsel or to the adverse party if he is not represented by a lawyer. Ordinarily an oral communication by a lawyer with a judge or hearing officer should be made only upon adequate notice to opposing counsel, or, if there is none, to the opposing party. A lawyer should not condone or lend himself to private importunities by another with a judge or hearing officer on behalf of himself or his client.

DR 7-102 — Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

(1) file a suit, assert a position, conduct a defense, delay a trial, or take other action on behalf of his client when he knows or when it is obvious that such action would serve merely to harass or maliciously injure another;

(2) knowingly advance a claim or defense that is unwarranted under existing law, except that he may advance such claim or defense if it can be supported by good faith argument for an extension, modification, or reversal of existing law;

(3) conceal or knowingly fail to disclose that which he is required by law to reveal;

(4) knowingly use perjured testimony or false evidence;

(5) knowingly make a false statement of law or fact;

(6) participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false;

(7) counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent;

(8) knowingly engage in other illegal conduct or conduct contrary to a Directory Rule.

(B) A lawyer who receives information clearly establishing that:

(1) his client has, in the course of the representation, perpetrated a fraud upon a person or tribunal shall promptly call upon his client to rectify the same, and if his client refuses or is unable to do so, he shall reveal the fraud to the effected person or tribunal;

(2) a person other than his client has perpetrated a fraud upon a tribunal shall promptly reveal the fraud to the tribunal.

DR 7-110 — Contact with Officials.

(A) A lawyer shall not give or lend any thing of value to a judge, official, or employee of a tribunal except as permitted by Section C(4) of Canon 5 of the Code of Judicial Conduct, but a lawyer may make a contribution to the campaign fund of a candidate for judicial office in conformity with Section B(2) under Canon 7 of the Code of Judicial Conduct.

(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promplty delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law, or by Section A(4) under Canon 3 of the Code of Judicial Conduct.

EC 8-5

Fraudulent, deceptive, or otherwise illegal conduct by a participant in a proceeding before a tribunal or legislative body is inconsistent with fair administration of justice, and it should never be participated in or condoned by lawyers. Unless constrained by his obligation to preserve the confidences and secrets of his client, a lawyer should reveal to appropriate authorities any knowledge he may have of such improper conduct.

EC 8-6

Judges and administrative officials having adjudicatory powers ought to be persons of integrity, competence, and suitable temperament. Generally, lawyers are qualified, by personal observation or investigation, to evaluate the qualifications of persons seeking or being considered for such public offices, and for this reason they have a special responsibility to aid in the selection of only those who are qualified. It is the duty of lawyers to endeavor to prevent political considerations from outweighing judicial fitness in the selection of judges. Lawyers should protest earnestly against the appointment or election of those who are unsuited for the bench and should strive to have elected or appointed thereto only those who are willing to forego pursuits, whether of a business, political, or other nature, that may interfere with the free and fair consideration of questions presented for adjudication. Adjudicatory officials, not being wholly free to defend themselves, are entitled to receive the support of the bar against unjust criticism. While a lawyer as a citizen has a right to criticize such officials publicly, he should be certain of the merit of his complaint, use appropriate language, and avoid petty criticisms, for unrestrained and intemperate statements tend to lessen public confidence in our legal system. Criticisms motivated by reasons other than a desire to improve the legal system are not justified.

Standard 60

In an adversary proceeding, a lawyer shall not initiate communication or cause another to initiate communication as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(a) in the course of official proceedings in the cause;

(b) in writing if he simultaneously delivers a copy of the writing to opposing counsel, or to the adverse party if he is not represented by an attorney;

(c) orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by an attorney;

(d) as otherwise authorized by law or by the Code of Judicial Conduct.

A violation of his standard may be punished by a public reprimand.

DR 4-101 — Preservation of Confidence and Secrets of a Client.

(B) Except when permitted under DR 4-101(C), a lawyer shall not knowingly:

(1) reveal a confidence or secret of his client;

(2) use a confidence or secret of his client to the disadvantage of the client;

(3) use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(C) A lawyer may reveal:

(1) confidences or secrets with the consent of the client or clients affected;

(2) confidences or secrets when permitted under Disciplinary Rules or required by law or court order;

(3) the intention of his client to commit a crime and the information necessary to prevent the crime;

(4) confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(D) A lawyer shall exercise reasonable care to prevent his employees, associates, and others whose services are utilized by him from disclosing or using confidences or secrets of a client, except that a laywer may reveal the information allowed by DR 4-101 (C) through an employee.

Standard 28.

A lawyer may not reveal the confidences and secrets of a client.

(A) Except when permitted under Section 28(B) below, a lawyer shall not knowingly;

(1) use a confidence or secret of his client to the disadvantage of his client;

(2) use a confidence or secret of his client for the advantage of himself or of a third person, unless the client consents after full disclosure.

(B) A laywer may reveal:

(1) confidences or secrets with the consent of the client or clients affected, but only after a full disclosure to them;

(2) confidences or secrets when permitted under disciplinary rules or required by law or court order;

(3) the intention of his client to commit a crime and the information necessary to prevent the crime;

(4) confidences or secrets necessary to establish or collect his fee or to defend himself or his employees or associates against an accusation of wrongful conduct.

(C) "Confidence" refers to information protected by the attorney-client privilege under an applicable law, and "secret" refers to other information gained in the professional relationship that the client has requested to be held inviolate or the disclosure of which would be embarrassing or would be likely to be detrimental to the client.

A violation of this standard may be punished by disbarment.

Bankruptcy Rule of Practice 505
Nepotism, Influence, and Interest

(A) Appointment or Employment of Relative of or Person Connected with Judge or Referee. No person may be appointed as trustee, receiver, marshal, or appraiser or employed as accountant or auctioneer in a bankruptcy case (1) if he is a relative of any judge or referee of the court making the appointment or authorizing the employment, or (2) if he is so connected with any judge or referee of the court making the appointment or authorizing the employment as to render such appointment or employment improper.

(B) Disqualification of Judge or Referee from Acting in Case: Relationship to Party or Attorney; Interest in Case; Appearance of Influence. Any judge or referee shall disqualify himself in any bankruptcy case (1) in which he is a relative of any party or his attorney, has a substantial, direct or indirect interest, has been of counsel, or is or has been a material witness, or (2) if his acting therein would justify the impression that any person can improperly influence him or unduly enjoy his favor, or that he is affected by the kinship, rank, position, or influence of any party or other person.

(C) Disqualification of Judge or Referee from Authorizing Employment of Attorney. Any judge or referee shall disqualify himself from authorizing the employment and from determining the compensation of (1) a relative as an attorney in a bankruptcy case, or (2) an attorney in a bankruptcy case if the judge or referee is so connected with the attorney as to render it improper for him to authorize such employment.

Rule 920. Contempt Proceedings

(A) Contempt Committeed in Proceedings Before Referee.

(1) Summary Disposition by Referee. Misbehavior prohibited by Sec. 41a(2) of the Act may be punished summarily by the referee as contempt if he saw or heard the conduct constituting the contempt and it was committed in his actual presence. The order of contempt shall recite the facts and shall be signed by the referee and entered of record.

(2) Disposition by Referee upon Notice and Hearing. Any other conduct prohibited by Sec. 41a of the Act may be punished by the referee only after hearing on notice. The notice shall be in writing and shall state the time and place of hearing, allowing a reasonable time for the preparation of the defense, and shall state the essential facts constituting the contempt charged and whether the contempt is criminal or civil or both. The notice may be given on the referee's own initiative or on motion by a party, by the United States attorney, or by an attorney appointed by the referee for that purpose. If the contempt charged involves disrespect to or criticism of the

referee, he is disqualified from presiding at the hearing except with the consent of the person charged.

(3) Limits on Punishment by Referee. A referee shall not order imprisonment nor impose a fine of more than $250 as punishment for any contempt, civil or criminal.

(4) Certification to District Judge. If it appears to a referee that conduct prohibited by Sec. 41a of the Act may warrant punishment by imprisonment or by a fine of more than $250. He may certify the facts to the district judge. On such certification the judge shall proceed as for a contempt not committed in his presence.

(B) Contempt Committed in Proceedings Before District Judge. Any contempt committed in proceedings before a district judge while acting as a bankruptcy judge shall be prosecuted as any other contempt of the district court.

(C) Right to Jury Trial. Nothing in this rule shall be construed to impair the right to jury trial whenever it otherwise exists.

Local Rules of the United States District Court for the Northern District of Georgia

91.8

91.8. Orders Made Orally in Court.

Unless the Court directs otherwise, all orders including findings of fact and conclusions of law orally announced in court shall be prepared in writing by the attorney for the prevailing party and taken to the judge within two days thereafter, with sufficient copies for all parties and the Court.

Rule 350. Bill of Costs to be Filed by Prevailing Party

351.1 Time Limit.

A bill of costs must be filed by the prevailing party within 30 days after the entry of judgment or such costs will not be allowed to be taxed as a part of the judgment.

71.34

When a petition is called, one of the members of the bar of his Court shall move the admission of the petitioner. When admitted, the petitioner shall take an oath in the following form:

"I do solemnly swear (or affirm) that I will support the Constitution of the United States; that I will bear true faith and allegiance to the Government of the United States; that I will maintain the respect due to the courts of justice and judicial offices; that I will well and faithfully discharge my duties as an attorney and officer of this Court; and that I will demean myself uprightly and according to the law and the recognized standards of ethics of the legal profession. So help me God."

71.54

The standard of professional conduct of the members of the bar of this Court shall include the current canons of professional ethics of the American Bar Association. A violation of any of these canons in connection with any matter pending before this Court shall constitute a contempt of this Court and an attorney may be subjected to appropriate disciplinary action. In this regard, this Court may from time to time appoint grievance committees to investigate any complaints made to it or referred to it by the Court respecting alleged improper professional conduct of any member of the bar in any way connected with his practice in this Court. In such case the committee appointed shall operate under the direction of the Court and shall take such actions as directed by the Court in the order appointing it.

Federal Rules of Appellate Procedure

(Amendments Effective August 1, 1979)

All of the following amendments are to the Federal Rules of Appellate Procedure. All matter stricken out by the amendments is in boldface brackets; new matter is in italics.

Rule 4. Appeals as of Right — When Taken

(A) Appeals in Civil Cases.

(1) In a civil case **[**(including a civil action which involves an admiralty or maritime claim and a proceeding in bankruptcy or a controversy arising therein)**]** in which an appeal is permitted by law as of right from a district court to a court of appeals the notice of appeal required by Rule

3 shall be filed with the clerk of the district court within 30 days [of] after the date of entry of the judgment or order appealed from; but if the United States or an officer or agency thereof is a party, the notice of appeal may be filed by any party within 60 days [of] *after* such entry. *If a notice of appeal is mistakenly filed in the court of appeals, the clerk of the court of appeals shall note thereon the date on which it was received and transmit it to the clerk of the district court and it shall be deemed filed in the district court on the date so noted.*

(2) Except as provided in (A)(4) of this Rule 4, a notice of appeal filed after the announcement of a decision or order but before the entry of the judgment or order shall be treated as filed after such entry and on the date thereof.

(3) If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within 14 days [of] *after* the date on which the first notice of appeal was filed, or within the time otherwise prescribed by this [subdivision] *Rule 4(A)*, whichever period last expires.

[The running of the time for filing a notice of appeal is terminated as to all parties by a timely motion filed in the district court by any party pursuant to the Federal Rules of Civil Procedure hereafter enumerated in this sentence, and the full time for appeal fixed by this subdivision commences to run and is to be computed from the entry of any of the following orders made upon a timely motion under such rules: (1) granting or denying a motion for judgment under Rule 50(b); (2) granting or denying a motion under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (3) granting or denying a motion under Rule 59 to alter or amend the judgment; (4) denying a motion for a new trial under Rule 59. A judgment or order is entered within the meaning of this subdivision when it is entered in the civil docket.

Upon a showing of excusable neglect, the district court may extend the time for filing the notice of appeal by any party for a period not to exceed 30 days from the expiration of the time otherwise prescribed by this subdivision. Such an extension may be granted before or after the time otherwise prescribed by this subdivsion has expired; but if a request for an extention is made after such time has

expired, it shall be made by motion with such notice as the court shall deem appropriate.]

(4) If a timely motion under the Federal Rules of Civil Procedure is filed in the district court by any party: (i) for judgment under Rule 50(b); (ii) under Rule 52(b) to amend or make additional findings of fact, whether or not an alteration of the judgment would be required if the motion is granted; (iii) under Rule 59 to alter or amend the judgment; or (iv) under Rule 59 for a new trial, the time for appeal for all parties shall run from the entry of the order denying a new trial or granting or denying any other such motion. A notice of appeal filed before the disposition of any of the above motions shall have no effect. A new notice of appeal must be filed within the prescribed time measured from the entry of the order disposing of the motion as provided above. No additional fees shall be required for such filing.

(5) The district court, upon a showing of excusable neglect or good cause, may extend the time for filing a notice of appeal upon motion filed not later than 30 days after the expiration of the time prescribed by this Rule 4(a). Any such motion which is filed before expiration of the prescribed time may be ex parte unless the court otherwise requires. Notice of any such motion which is filed after expiration of the prescribed time shall be given to the other parties in accordance with local rules. No such extension shall exceed 30 days past such prescribed time or 10 days from the date of entry of the order granting the motion, whichever occurs later.

(6) A judgment or order is entered within the meaning of this **[**subdivsion**]** *Rule 4(A)* when it is entered in *compliance with Rules 58 and 79(a) of the Federal Rules of Civil Procedure* **[**the civil docket**]**.

Rule 6. Appeals by Allowance in Bankruptcy Proceedings.

(A) Petition for Allowance. Allowance of an appeal under section 24 of the Bankruptcy Act (11 U.S.C. Sec. 47) from orders, decrees, or judgments of a district court involving less than $500, or from an order making or refusing to make allowances of compensation or reimbursement under sections 250 or 498 thereof (11 U.S.C. Sec. 650, Sec. 898) shall be sought by filing a petition for allowance with

the clerk of the court of appeals within the time provided by Rule 4(A) for filing a notice of appeal, with proof of service on all parties to the action in the district court. A notice of appeal need not be filed.

Rule 35. Determination of Causes by the Court in Banc.

(A) When Hearing or Rehearing in Banc Will Be Ordered. A majority of the circuit judges who are in regular active service may order that an appeal or other proceeding be heard or reheard by the court of appeals in banc. Such a hearing or rehearing is not favored and ordinarily will not be ordered except (1) when consideration by the full court is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance.

(B) Suggestion of a Party for Hearing or Rehearing in Banc. A party may suggest the appropriateness of a hearing or rehearing in banc. No response shall be filed unless the court shall so order. The clerk shall transmit any such suggestion to the members of the panel and the judges of the court who are in regular active service but a vote need not be taken to determine whether the cause shall be heard or reheard in banc unless a judge in regular active service or a judge who was a member of the panel that rendered a decision sought to be reheard request a vote on such a suggestion made by a party.

(C) Time for Suggestion of a Party for Hearing or Rehearing in Banc; Suggestion Does Not Stay Mandate. If a party desires to suggest that an appeal be heard initially in banc, the suggestion must be made by the date on which th appellee's brief is filed. A suggestion for a rehearing in banc must be made within the time prescribed by Rule 40 for filing a petition for rehearing, whether the suggestion is made in such petition or otherwise. The pendency of such a suggestion whether or not included in petition for rehearing shall not affect the finality of the judgment of the court of appeals or stay the issuance of the mandate.

Rule 40. Petition for Rehearing.

(A) Time for Filing; Content; Answers; Action by Court If Granted. A petition for rehearing may be filed within 14 days after entry of judgment unless the time is shortened

or enlarged by order or by local rule. The petition shall state with particularity the points of law or fact which in the opinion of the petitioner the court has overlooked or misapprehended and shall contain such argument in support of the petition as the petitioner desires to present. Oral argument in support of the petition will not be permitted. No answer to a petition for rehearing will be received unless requested by the court, but a petition for rehearing will ordinarily not be granted in the absence of such a request. If a petition for rehearing is granted the court may make a final disposition of the cause without reargument or may restore it to the calendar for reargument or resubmission or make such other orders as are deemed appropriate under the circumstances of the particular case.

Rule 38. Jury Trial of Right.

(A) Right Preserved. The right of trial by jury as declared by the Seventh Amendment to the Constitution or as given by a statute of the United States shall be preserved to the parties inviolate.

(B) Demand. Any party may demand a trial by jury of any issue triable or right by a jury by serving upon the other parties a demand therefor in writing at any time after the commencement of the action and not later than 10 days after the service of the last pleading directed to such issue. Such demand may be indorsed upon a pleading of the party.

(C) Same: Specification of Issues. In his demand a party may specify the issues which he wishes so tried; otherwise he shall be deemed to have demanded trial by jury for all the issues so triable. If he has demanded trial by jury for only some of the issues, any other party within 10 days after service of the demand or such lesser time as the court may order, may serve a demand for trial by jury or any other or all of the issues of fact in the action.

(D) Waiver. The failure of a party to serve a demand as required by this rule and to file it as required by Rule 5(d) constitutes a waiver by him of trial by jury. A demand for trial by jury made as herein provided may not be withdrawn without the consent of the parties.

(E) Admiralty and Maritime Claims. These rules shall not be construed to create a right to trial by jury of the

issues in an admiralty or maritime claim within the meaning of Rule 9(h).

Rule 54. Judgments; Costs.

(B) Judgment Upon Multiple Claims or Involving Multiple Parties. When more than one claim for relief is presented in an action, whether as a claim, counterclaim, cross-claim, or third-party claim, or when multiple parties are involved, the court may direct the entry of a final judgment as to one or more but fewer than all of the claims or parties only upon an express determination that there is no just reason for delay and upon an express direction for the entry of judgment. In the absence of such determination and direction, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties, and the order or other form of decision is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties.

Rule 60. Relief From Judgment or Order.

(B) Mistakes; Inadvertence; Excusable Neglect; Newly Discovered Evidence; Fraud, Etc. On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgmemt, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore denominated intrisic or extrinsic), misrepresentation, or other misconduct of any adverse party; (4) the judgment is void; (5) the judgment has been satisifed, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subdivision (B) does not

affect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., Sec. 1655, or to set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any relief from a judgment shall be by motion as prescribed in these rules or by an independent action.

Rule 408. Compromise and Offers To Compromise

Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the cliam or its amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations. This rule also does not require exclusion when the evidence is offered for another purpose, such as proving bias or prejudice of a witness, negativing a contention of undue delay, or proving an effort to obstruct a criminal investigation or prosecution.

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

JOHN C. PENNINGTON, Trustee for Georgia Paneling Supply, Inc., Bankrupt, Plaintiff,

vs.

AETNA BUSINESS CREDIT, INC., and **THE C & S BANK OF NORTH FULTON,** Defendants.

Civil Action File No. C75-1540A

ANSWER AND COUNTERCLAIM

COUNTERCLAIM

NOW COMES Defendant AETNA BUSINESS CREDIT, INC., and for its Counterclaim against Intervenors states and shows the following:

1.

Intervenors, by virtue of the filing by them of a Complaint against Defendant, have submitted themselves and are therefore subject to jurisdiction of this Court.

2.

This Counterclaim is a civil action wherin the amount in controversy exceeds the sum or value of TEN THOUSAND ($10,000.00) DOLLARS, exclusive of interest and costs, and is for damages brought against Intervenors pursuant to 28 U.S.C. Sec. 1332 and pursuant to the doctrines of pendent and ancillary jurisdiction to enforce rights and liabilities arising under the several statutory provisions and common law principles of state and federal law relating to fraud, misrepresentation, deceit, civil conspiracy, malicious use and abuse of process and assessment of costs and attorney's fees.

3.

Georgia Paneling Supply, Inc. (hereinafter "the Bankrupt") was adjudicated a bankrupt upon an involuntary petition filed by three of Intervenors on or about June 24, 1974, and consented to by the Bankrupt on July 29, 1974. On September 10, 1974, John C. Pennington was appointed Trustee of the bankrupt estate, which was on the date of his appointment and is now without any assets.

4.

On July 9, 1975, the Trustee initiated the within proceeding at the prompting and urging of Intervenors.

5.

On January 20, 1976, the Trustee made application to the Bankruptcy Court to settle this action with Defendant. Internenors[sic] appeared in opposition to such settlement and moved to intervene in this action.

6.

On April 16, 1976, the Trustee renewed his application to the Bankruptcy Court to settle with Defendant and on May 6, 1976, Intervenors countered with an application to remove the Trustee from office and an application requesting the appointment of a named successor trustee with Intervenors' counsel to serve as such successor trustee's attorney.

7.

On June 17, 1976, following a hearing on the aforesaid applications on May 18, 1976, the Bankruptcy Court entered an order granting the Trustee's settlement application and denying those applications filed by Intervenors.

8.

On September 30, 1976, this Court granted Intervenors' motion to intervene herein.

9.

On April 15, 1977, the order of the Bankruptcy Court approving the Trustee's settlement application was affirmed on appeal by this Court.

10.

On May 16, 1977, Intervenors filed with this Court a motion to extend the time for filing an appeal from this Court's affirmance of the Bankruptcy Court's order, and said motion was denied by this Court on June 15, 1977.

11.

On May 31, 1977, Intervenors filed with this Court a motion under Rule 60(b) of the Federal Rules, as well as four amendments thereto, for relief from the effect of the Bankruptcy Court's order as affirmed on appeal, and said motion was initially denied by this Court but thereafter was remanded to the Bankruptcy Court for hearing upon a second motion under Rule 60(b) filed by Intervenors.

12.

On June 13, 1977, the Bankruptcy Court entered an order upon an application filed by Defendant granting Defendant's request pursuant to Rule 802 of the Bankruptcy Rules for an assessment against Intervenors of the costs of the transcript used on appeal in the amount of $131.50, and Intervenors appealed from said order on August 8, 1977, more than 50 days after the entry of the order appealed from.

13.

Prior to the hearing before the Bankruptcy Court on Intervenor's remanded Rule 60(b) motion, Intervenors filed with the Bankruptcy Court a motion requesting the Bankruptcy Court to continue the hearing to a later date, to set aside two weeks for hearing said remanded motion and to prevent Defendant from participating in said hearing. This motion was denied by the Bankruptcy Court on September 16, 1977, and Intervenors appealed therefrom on September 19, 1977, to this Court.

14.

On September 19, 1977, the date set for the hearing upon Intervenors' remanded motion, Intervenors moved the Bankruptcy Court for a stay pending the appeal taken from the Bankruptcy Court's order of September 16 and also moved the Bankruptcy Court to reassign the matter to any other judge who would be able to devote two weeks to hearing the remanded motion. Both of these motions were denied by the Bankruptcy Judge by order dated September 19, 1977.

15.

On October 4, 1977, this Court entered an order granting Defendant's motion to dismiss Intervenors' 100-page Third Amended Complaint, having previously dismissed Intervenors' original complaint, and 80-page Second Amended Complaint, and requiring Intervenors to pay to Defendant the sum of $600.00 as a condition to their filing a Fourth Amended Complaint.

COUNT ONE

16.

The averments contained in paragraphs 1 through 15, inclusive, of this Counterclaim are hereby incorporated, restated and realleged, the same as if fully set forth verbatim herein.

17.

Intervenors' opposition to the Trustee's settlement with Defendant, and all appeals taken in connection therewith and motions filed with respect thereto, has[sic] been made in bad faith, maliciously, solely for the purpose of delay and with knowledge of the impropriety of their actions.

18.

Intervenors have, without just cause or excuse, attempted to frustrate and delay the finality of said settlement and, to that end, have by the filing of frivolous and untimely motions, appeals and other documents so multiplied these proceedings and the settlement proceedings before the Bankruptcy Court as to increase unreasonably and vexatiously the costs of said proceedings, all of which actions have been taken solely for the purpose of annoyance and harrassment of Defendant.

19.

Defendant has incurred substantial attorney's fees and expenses in defending against and responding to the numerous pleadings, motions, and appeals filed herein and in the settlement proceedings before the Bankruptcy Court, for which Defendant is entitled to recover from Intervenors.

COUNT TWO

20.

The averment contained in paragraphs 1 through 18, inclusive, of this Counterclaim are hereby incorporated, restated and realleged the same as if fully set forth herein verbatim.

21.

Pursuant to a combination and conspiracy to defraud and injure Defendant, Intervenors have made false allegations in their pleadings, answers to interrogatories herein, and motions filed and statements made in the settlement proceedings before the Bankruptcy Court, concerning material facts which they knew were false at the time such allegations were made or which they made with reckless disregard of the truth or falsity of same, to-wit: that Defendant never made a loan or an advance of money to the Bankrupt: that Defendant caused the Bankrupt to purchase supplies from Intervenors; that Defendant conspired with The C & S Bank of North Fulton to defraud

Intervenors; that each of the Intervenors knew that Defendant was financing the receivables of the Bankrupt and relied upon such financing in making credit sales of goods to the Bankrupt; that Defendant prevented the Bankrupt from filing a petition under Chapter XI of the Bankruptcy Act; that each of the Intervenors was unaware of the alleged insolvency of the Bankrupt prior to the sale of goods by them to the Bankrupt; that Defendant cooperated and assisted in the establishment of a company known as North Georgia Paneling; that Defendant made misrepresentations of facts to Intervenors prior to June 7, 1974, when, in fact, Intervenors never had any communication with Defendant; that Defendant made advances to Georgia Paneling Company which were earmarked by Defendant to be used by Georgia Paneling Company to pay International Paper; that Defendant knew that The C & S Bank of North Fulton had allegedly reached or exceeded its lending limit to the Bankrupt; that Defendant resorted to force and coercion in taking possession its its collateral; that Defendant ordered goods from Intervenor Hampton Lumber Sales Company; that Defendant destroyed all or a part of the financial statements provided to it by the Bankrupt; that Defendant instructed Georgia Paneling Company not to pay Intervenors; that Defendant divulged to The C & S Bank of North Fulton information obtained by Defendant from audits of the Bankrupt; that Defendant showed its loan documents to The C & S Bank of North Fulton in June, 1973, October, 1973, and January, 1974; that The C & S Bank of North Fulton agreed to indemnify Defendant for any loss it might incur in connection with credit extended by Defendant to the Bankrupt or Georgia Paneling Company; that Defendant represented to Intervenors that the Bankrupt was solvent; that Defendant seized and sold equipment of the Bankrupt; and that Defendant knew that the Bankrupt was advising Intervenors that Defendant was financing the Bankrupt's accounts receivable.

22.

By reason of these false and fraudulent allegations, which were intentionally and maliciously made, Defendant has incurred substantial legal expenses in disproving such allegations, for which it is entitled to recovery from Intervenors together with punitive damages.

COUNT THREE

23.

The averments contained in paragraphs 1 through 21, inclusive, of this Counterclaim are hereby incorporated, restated and realleged, the same as if fully set forth herein verbatim.

24.

Intevenors have maliciously used and abused the process of this Court by unnecessarily prolonging and delaying this litigation; by filing complaints against Defendant which contain false and materially misleading allegations; by attempting to force Defendant to settle with them by frustrating the settlement between Defendant and the Trustee; and, in the case of Defendant Hampton Lumber Sales Company, by maintaining multiple suits against Defendant to recover damages for the same alleged wrongdoing.

25.

Intervenors have acted in bad faith, tortiously and maliciously, have been stubbornly litigious and have caused Defendant unnecessary trouble and expense, thereby entitling Defendant to an award of attorney's fees and punitive damages to deter Intervenors and each of them from engaging in the same or similar conduct in the future.

WHEREFORE, Defendant seeks a trial of the issues set forth in its Counterclaim and respectfully prays:

(1) That it have a general judgment and verdict against Intervenors, and each of them, in the amount of ONE HUNDRED THOUSAND ($100,000.00) DOLLARS as and for damages incurred by Defendant;

(2) That it be awarded punitive and exemplary damages against Intervenors, and each of them, in the amount of FIVE HUNDRED THOUSAND ($500,00.00) DOLLARS:

(3) That all costs of this action be cast upon Intervenors; and

(4) That it have such other and further relief as is just and equitable in the premises.

HUIE, STERN, BROWN & IDE

/s/R. WILLIAM Ide. III

/s/C. EDWARD DOBBS

ATTORNEYS FOR DEFENDANT
AETNA BUSINESS CREDIT, INC.

1200 Standard Federal Savings Building
Atlanta, Georgia 30303
(404) 522-8700

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing upon all counsel of record by depositing same in the U.S. Mail, postage prepaid, in an envelope properly addressed to:

W. Kent Bishop, Esquire
Moffett, Henderson & Bishop
1835 First National Bank Tower
Atlanta, Georgia 30303

William Humphreys, Jr., Esquire
Alston, Miller & Gaines
1200 C&S National Bank Building
Atlanta, Georgia 30303

Douglas Cronkright, Esquire
Freeman & Hawkins
618 Fulton Federal Building
Atlanta, Georgia 30303

This 25th day of October, 1977.

/s/C. EDWARD DOBBS

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HAMPTON LUMBER SALES COMPANY, Plaintiff,

vs.

AETNA BUSINESS CREDIT, INC., Defendant.

Civil Action File No. C74-1679A

DEFENDANT'S MOTION FOR RECONSIDERATION

NOW COMES Defendant AETNA BUSINESS CREDIT, INC. and hereby respectfully moves this Honorable Court to reconsider its Order denying Defendant's Motion for Partial Summary Judgment for the reasons set forth in Defendant's Brief submitted in support hereof, and, upon reconsideration, to grant said Motion.

KUTAK ROCK & HUIE

/s/ R. WILLIAM IDE

/s/ C. EDWARD DOBBS
ATTORNEYS FOR AETNA BUSINESS CREDIT, INC.

1200 Standard Federal Building
Atlanta, Georgia 30303
(404) 522-8700

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

HAMPTON LUMBER SALES COMPANY, Plaintiff,

vs.

AETNA BUSINESS CREDIT, INC., Defendant.

Civil Action File No. C74-1679A

DEFENDANT'S BRIEF IN SUPPORT OF MOTION FOR RECONSIDERATION

STATEMENT OF CASE

This is a civil action for damages wherein Plaintiff seeks to recover from Aetna Business Credit, Inc. ("Aetna") the sum of $20,332.59 as actual damages, which represents the purchase price of four carloads of lumber sold by Plaintiff to Georgia Paneling Supply, Inc. ("GPS").

On July 11, 1977, Aetna filed a Motion for Partial Summary Judgment seeking a judgment in its favor with respect to the first of these four carloads of lumber, which represents $9,831.85 of the total actual damages sought by Plaintiff.

A response to Aetna's Motion for Partial Summary Judgment was due from Plaintiff on or before August 1, 1977. Instead of filing a response in accordance with Rule 56 of the Federal Rules of Civil Procedure and Rule 91.2 of the Local Rules of this Court, Plaintiff filed a document styled "Initial Response", wherein it unilaterally claimed entitlement to an extension of time of twenty-two additional days within which to respond to Aetna's Motion on the grounds that it had not yet filed its Third Amended Complaint in the matter of *John C. Pennington, Trustee v. Aetna Business Credit, Inc.* (Civil Action No. C75-1540A).* On August 23, 1977, exactly forty-three days after the filing of Aetna's

*As this Court will recall, Plaintiff's Third Amended Complaint in the *Pennington* case, which consisted of more than 100 pages, was dismissed by this Court as being excessively lengthy, and Plaintiff was required to pay to Aetna the sum of $600.00 as a condition to refiling its Fourth Amended Complaint.

Motion and twenty-two days beyond the time when a response to Aetna's Motion was due, Plaintiff finally filed a response to Aetna's Motion.

On December 30, 1977, this Court entered an order denying Aetna's Motion.

The purpose of this Motion is to request the Court to reconsider Aetna's Motion in light of the comments which follow hereinbelow, and to grant said Motion.

UNDISPUTED FACTS

The allegations of Plaintiff's Complaint are that Plaintiff sold four carloads of lumber to GPS on a credit basis; that on June 7, 1974, Aetna took possession of the premises of GPS for the purpose of foreclosing its security interest upon the inventory of GPS; that, in the process of such foreclosure, Aetna seized these carloads of lumber and sold same after first inducing the railroad shipping agent to release the carloads to an Aetna representative; and that these actions of Aetna give rise to a cause of action in Plaintiff for conversion and fraud.

The undisputed facts, however, clearly demonstrate with respect to the first carload of lumber that:

(1) On May 24, 1974, Plaintiff sold the first carload of lumber to GPS, and Aetna was totally unaware that this sale had taken place;

(2) The rail car arrived at Southern Railway's Chamblee, Georgia office on June 3, 1974, prior to Aetna's arrival at the premises of GPS;

(3) The rail car was actually placed at GPS's Doraville, Georgia warehouse for offloading on June 5, 1974, prior to Aetna's arrival at the premises of GPS;

(4) The lumber contained in the rail car was unloaded by employees of GPS, and not at the request or direction of Aetna, and the empty rail car was released by GPS to Southern Railway at 2:00 p.m. on June 7, 1974;

(5) Aetna did not unload any of the lumber, not request that it be unloaded, and Aetna did not sell any of the inventory of GPS until on or after June 12, 1974;

(6) Plaintiff did not demand the return of its lumber until June 27, 1974, more than 20 days beyond the time within which such a demand is required by law to be made

(*Ga. Code Ann.* Sec. 109A-2—702) in order to reclaim goods sold on credit.

Not one of the foregoing facts is disputed by Plaintiff, except to the extent that Plaintiff contends that the facts are disputed without citation to the record or supporting affidavits.

DISCUSSION

Rule 56(e) of the Federal Rules of Civil Procedure was amended in 1963 to include the following two sentences, which are *uniquely* applicable to the instant case:

> ""When a motion for summary judgment is made and supported as provides in this rule, *an adverse party may not rest upon the mere allegations or denials of his pleadings,* but his response, by affidavits or as otherwise provided in this rule, must set forth *specific facts that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.*" (Emphasis added).

The foregoing amendment serves to re-enforce the underlying purpose of the summary judgment procedure — to pierce the pleadings so that the burden and expense of a trial will not be wasted on baseless claims or phamtom[sic] issues. *See* 10 Wright & Miller, *Federal Practice and Procedure* Sec. 2739 at p. 715 (West 1973). As stated by Justice Cardoze in *Richard v. Credit Suisse,* 152 N.E. 110, 111 (1926)

> "The very object of a motion for summary judgment is to separate what is formal or pretended in denial or averment from what is genuine and substantial, so that only the latter may subject a suitor to the burden of a trial."

Accordingly, as this Court is aware, a party opposing a motion for partial summary judgment cannot discharge his burden by simply alleging legal conclusions. *See Southern Concrete Co. v. U.S. Steel Corp.,* 535 F.2d 313 (5th Cir. 1976); *Liberty Leasing Co. v. Hillsum Sales Corp.,* 380 F.2d 1013 (5th Cir. 1967). Nor is he entitled to a trial on the basis of what he "believes" to be the case or on the basis of his hope that he can produce some evidence at that time.

DeBardeleban v. Cummings, 453 F.2d 320 (5th Cir. 1972). As noted by the Fifth Circuit in the *Liberty Leasing Co.* case, *supra*,

> "[R]ule 56 requires that the opposing party be *diligent* in countering a motion for summary judgment, *Southern Rambler Sales, Inc. v. American Motors Corp.*, 5th Cir. 1967, 375 F.2d 932, and *mere general allegations which do not reveal detailed and precise facts* will not prevent the award of summary judment, Fed. R. Civ. P. 56(e), *Robin Construction v. United States*, 3rd Cir., 1965, 345 F.2d 610, 613-614.

Id. at 1015 (emphasis added).*

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*Significantly, the Court in *Liberty Leasing* noted that the party opposing the motion was not justified in failing to file a timely response. At the very least, the Court observed, the respondent should have filed an affidavit under Rule 56(f). *Id.* at p. 1015. In the instant case, Plaintiff's untimely reponse likewise was without justification.

In the instant cause, Plaintiff's *untimely* filed response alleges in general terms that Aetna's Motion should be denied because of Aetna's alleged, but *unspecified*, acts of bad faith. Plaintiff, for example, argues that it "believes" that Aetna advised Southern Railway to remove the first carload in order to "make room" for the next three carloads that had arrived (*see* Plaintiff's Statement of Disputed Facts at Sec. 10), and that it "now has reason to believe from discovery to date" that an employee of GPS was in fact, acting "perhaps unwittingly" as an agent of Aetna when the first carload of lumber was ordered (*see* Plaintiff's Brief, p. 1). What Plaintiff "suspects" or "believes" to be the case is irrelevant, *see Alsbury v. U.S. Postal Service*, 530 F.2d 852 (9th Cir. 1976); *U.S. v. Mt. Vernon Milling Co.*, 345 F.2d 404, 407 (7th Cir. 1965) (mere speculation does not suffice to raise an issue of fact), and fails to controvert the undisputed facts involving this first carload of lumber. After more than two full years of discovery, Plaintiff should be required to set forth "detailed and precise facts" as required by Rule 56 and the *Liberty Leasing Co.* case.

It is also well settled that a motion for summary judgment cannot be defeated simply by contentions of fact

advanced in the brief of the opposing party inasmuch as such briefs are inherently self-serving and do not constitute probative evidence. *See Hartford Accident & Indemnity Co. v. Hartley,* 275 F.Supp. 610 (M.D. Ga.), *aff'd. per curiam* 389 F.2d 91 (5th Cir. 1968). As observed by the District Court in the *Hartford Accident* case, *supra,*

> "[A] mere denial in a brief of the facts without counter-affidavits controverting a convincing showing by the movant is not sufficient to create a real controversy, *Bruce Construction Corp. v. U.S.,* 242 F.2d 873(2) (5th Cir. 1957), and the granting of a summary judgment is not improper as unjustly depriving the party of a trial on the merits. *Cunningham v. Securities Investment Co. of St. Louis,* 278 F.2d 600 (1) (5th Cir. 1960). *If any additional showing could have been made to develop material facts other than those now in the record the duty was on the party relying upon those facts to make such disclosure. Chambers & Co. v. Equitable Life Assurance Soc.,* 224 F.2d 338(8) (5th Cir. 1955)."

Id. at 616 (emphasis added.* *Accord, U.S. v. Jones,* 155 F.Supp. 52 (M.D. Ga. 1957) (mere assertions in brief do not suffice to rebut motion for summary judment).

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*Similarly, a party opposing a motion cannot rest simply upon the general allegations of his pleadings. *Jackson v. Atlantic Monthly Co.,* 324 F.Supp. 1302 (N.D. Ga. 1971). *See* 10 Wright & Miller, *Federal Practice and Procedure* Sec. 2721 at p. 475 (West 1973). Plaintiff's response liberally cites to the Third Amended Complaint filed by it in the *Pennington* case.

In the case before the Court, Plaintiff makes many unsupported assertions of fact in its brief. Indeed, a review of Plaintiff's brief will demonstrate that Plaintiff has completely failed to cite to the record and to submit supporting affidavits for *any* of the factual assertions contained therein. It is clear that unsworn assertions that used to contradict sworn testimony by affidavit or deposition must be disregarded in passing upon a summary judgment motion. *See Reube v. Pharmacodynamics, Inc.,* 348 F.Supp. 900 (D. Pa. 1972).

The only offer of support that Plaintiff makes for its

numerous contentions of fact is contained in the Statement of Disputed Facts attached to its brief. Plaintiff therein first disputes Aetna's contention that Plaintiff was engaged in the wholesale lumber business by pointing out that Plaintiff serves as an exclusive sales agent for saw mills. This disputed issue of fact is clearly irrelevant.

Secondly, Plaintiff disputes Aetna's contention that Aetna had a perfected security interest in the inventory of GPS by contending that Aetna acted in bad faith and fraudulently. Plaintiff totally fails, however, to specify a single instance of fraud or bad faith on Aetna's part, and cites the Court only to its Third Amended Complaint in the *Pennington* case as presumed support for its position.

Thirdly, Plaintiff disuptes Aetna's statement that Aetna made cash advances to GPS upon request during 1974 by contending that Aetna made such advances only in its discretion. Plaintiff again cites the Court to its Third Amend Complaint in the *Pennington* case, which obviously is insufficient to overcome the clear wording of the affidavit submitted by Aetna in support of its statement of the facts. In any event, the fact is irrelevant and immaterial since there is no dispute that Aetna actually made the cash advances to GPS and that, at the time of Aetna's foreclosure in June of 1974, GPS was indebted to Aetna in an amount exceeding $100,000.00 by reason of those cash advances.

Fourthly, Plaintiff disputes Aetna's statement that J. Wayne French, who ordered the first carload of lumber from Plaintiff, was an officer of GPS by submitting that Mr. French "may have been an employee of Aetna on that date". Again, Plaintiff cites only to its Third Amended Complaint for this speculation (rather than statement) of fact.

Fifthly, Plaintiff disputes Aetna's statement that Plaintiff never conducted an investigation to determine whether GPS had granted a security interest in its inventory prior to the sale of the first carload by arguing that such an investigation would not have revealed that the property of GPS secured an indebtedness to Aetna of a company related to GPS known as Georgia Paneling Company. True to form, Plaintiff cites only to its Third Amended Complaint

as support of this assertion.* The dispute is, in any event, irrelevant because the undisputed facts demonstrate that GPS had granted a security interest to Aetna to secure an indebtedness of GPS to Aetna and that a financing statement was filed of record to perfect this security interest.

Sixthly, Plaintiff contends that there is a dispute as to the meaning of the passage of title terms contained in its own order acknowledgement form. This dispute is likewise irrelevant for the reasons discussed fully in Aetna's brief in support of its Motion. Regardless of whether title to the lumber passed when the lumber was shipped, as the acknowledgement form states, or when the goods arrived at GPS, Aetna's security interest attached to the lumber.

Seventhly, Plaintiff disputes Aetna's statement that the rail car containing the lumber was removed from the premises of GPS on June 7th; contends that the rail car was not so removed until June 8th; and speculates that Aetna may have ordered that the rail car be removed before it was unloaded in order to "make room" for three additional rail cars sold by Plaintiff. The date on which the rail car was actually removed is irrelevant given the *undisputed facts* that the car was unloaded on June 7th by *someone other than Aetna*. Plaintiff's *speculation* that Aetna ordered the car to be removed before it was completely unloaded is just that — pure speculation — and there is nothing in the record from which even an inference might be drawn that Aetna directed the rail car to be removed.

Eighthly, Plaintiff disputes Aetna's statement that peaceful possession of the GPS premises was requested on June 7, 1974, by contending that Aetna actually requested possession prior to that time. The date on which Aetna requested peaceful possession is absolutely irrelevant to this lawsuit. It is the date on which Aetna actually received peaceful possession that is significant and that date, as even Plaintiff concedes, was June 7, 1974.

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*This Court now has before it on appeal the remanded Rule 60(b) motion of Plaintiff and others, wherein they make the bold contention that Aetna *never* advanced any money at all to GPS, but rather made advances only to Georgia Paneling Company. This Court need only review the opinion of Judge William L. Norton, Jr. to discern the type of "evidence" that Plaintiff offered in support of this patently ridiculous contention.

Ninthly, Plaintiff disputes Aetna's statement that Aetna requested such peaceful possession as a result of defaults commited by GPS in making payment to Aetna by contending, *without citation to the record*, that Aetna never declared any default in writing. This disputed fact is also irrelevant inasmuch as Aetna was not required under its loan agreements with GPS (copies of which are attached to an affidavit submitted by Aetna) to give written notice of default, nor is written notice required under the Georgia Uniform Commercial Code.

Tenthly, Plaintiff disputes Aetna's statement regarding the time of day that Aetna's agent had the locks changed on the GPS warehouse by contending that Aetna asserted "dominion and control" of the premises earlier that day. Plaintiff cites to the deposition of an Aetna agent in support of the contention. However, a reading of the pages of that deposition, as well as reading of the deposition as a whole, makes clear that a *single* Aetna agent arrived on the GPS premises, advised the officers and employees of GPS that Aetna was exercising its rights to take possession of its collateral, and, meeting with no resistance whatsoever, had the locks changed on the GPS warehouse later that afternoon.

Eleventhly, Plaintiff disputes Aetna's statement that Aetna began to foreclose its security interest on or after June 12, 1974, by contending that Aetna actually began to foreclose some seven months earlier in December of 1973. No support for this fantastic assertion is offered, other than a citation to Plaintiff's ubiquitious Third Amended Complaint.

Next, Plaintiff disputes Aetna's statement that Aetna did not request Plaintiff to sell or deliver the first carload of lumber to Plaintiff by contending that J. Wayne French, an officer of Plaintiff, "because an agent or employee of Aetna during this period." Plaintiff cites to the deposition of Mr. French in support of this contention. A reading of the deposition, however, indicates readily that Plaintiff's citation is *grossly* misleading and a *deliberate* fabrication and misrepresentation of the facts. Mr. French was never employed by Aetna, nor paid by Aetna to do any act on Aetna's behalf, at any time prior to June 12, 1974. Plaintiff's implication that Mr. French was employed or requested by Aetna to order any lumber from Plaintiff is

bsolutely false and there is not one shred of evidence to indicate otherwise.

Finally, Plaintiff disputes Aetna's statement that Aetna never took delivery of the first carload of lumber by arguing that an Aetna agent did, in fact, take delivery of at least one half of the first carload of lumber. Plaintiff cites to the depositions of two Aetna employees (William Westbrook and Thomas Duke) as support for this assertion. The Court need only read the cited pages to discern that Plaintiff has again distorted and misrepresented their testimony. The unequivocal statements in the affidavit of Mr. Duke, which is attached to Aetna's Motion, clearly indicate that he never took delivery of the first carload of lumber.

The instant case is closely akin to the situation confronted by this Court in *Sagers v. Yellow Freight Systems, Inc.*, 388 F.Supp. (N.D. Ga. 1973). There, the defendant in an employment discrimination case filed a motion for summary judgment and the plaintiff in its response stated that they would adduce evidence at trial of "numerous examples" of the defendant's discriminatory practices. This Court, after first noting that Rule 56(3) requires a respondent to "set forth specific facts showing that there is a genuine issue for trial", stated the general rule that a court "will not look with indulgence upon a party who has presented neither evidentiary materials in opposition nor any reason for this failure to do so." *Id.* at 520. The Court likewise quoted with approval from Moore's treatise that

> "[I]t is certainly well settled that the opposing party is *not entitled to hold back his evidence until trial on the posibility that an issue of material fact might arise if the case were to go to trial on the merits.*"

Id. at p. 520 (emphasis added).

In the case at bar, Plaintiff has alleged that Aetna has acted in bad faith and fraudulently towards it, but has failed and refused in its response to Aetna's Motion to come forward with the evidence that it claims to have in support of such contentions. Plaintiff is required to disclose fully what the evidence will be on the issues and may not withhold what it intends to use at trial. *See Standard Dredging Corp. v. Inter-American Center Authority*, 351

F.2d 470 (5th Cir. 1965); *Sartor v. Arkansas Natural Gas Corp.*, 134 F.2d 433 (5th Cir. 1943), *rev'd on other grounds* 321 U.S. 620.*

The Court in its order denying Aetna's Motion for Partial Summary Judgment noted that such motions are frequently denied in "large" cases and that Aetna's Motion was particularly inapposite because many of the issues in the instant case are "inextricably intertwined" with issues in the *Pennington* case. It is respectfully submitted that this case is "large" only because Plaintiff has unnecessarily made it so. The facts of this case are extremely simple and are undisputed by Plaintiff, notwithstanding Plaintiff's vain efforts to obfuscate the facts and to create a semblance of a dispute by imporperly citing to its own pleadings as support for the existence of a dispute. Nor are the issues of this case inextricably intertwined with those presented in the *Pennington* suit. The facts forming the basis of Plaintiff's claim in that case as well as in the instant case are *identical*, and the issues of law presented are likewise the *same*. More importantly, however, the Court should be mindful of the fact that Plaintiff has accused Aetna of fraud and conversion. Such allegations should not lightly be made. After three full years of discovery, one would justifiably assume that Plaintiff would and could, in response to Aetna's Motion, produce some fact in support of its claims. It has not done so. Plaintiff *has not* and *cannot* properly dispute any material fact forming the basis for Aetna's Motion.

It is, therefore, respectfully urged that the Court, in the words of Justice Cardoza, "separate what is formal and pretended from what is genuine and substantial" by reconsidering and granting Aetna's Motion.

SUMMARY

(1) Contrary to the clear mandate of Rule 56(e) of the Federal Rules of Civil Procedure, Plaintiff has totally failed to cite to the Court any *facts* that are material and

*This Court in a recent order entered in the *Pennington* case temporarily suspended ruling on the motion for summary judgment filed by C&S and directed Plaintiff's counsel to set forth *in detail* the evidence that it had to support its factual contentions.

genuinely disputed, and that would justify the denial of Aetna's Motion.

(2) The facts surrounding Aetna's Motion for Partial Summary Judgment are not complicated. The uncontroverted facts show a sale of lumber to GPS and a foreclosure by Aetna more than a week after that lumber was delivered to GPS. Aetna neither ordered nor received delivery of the lumber.

(3) No issue of fraud or state of mind is involved in this case. The undisputed facts make clear that no representations whatsoever were made by Aetna to any person, either prior to or after the sale and delivery of the first carload of lumber.

(4) Plaintiff, without any justification, has failed to file a timely response to Aetna's Motion, basing its refusal to do so upon an extension of time which it (rather than this Court) granted to itself.

CONCLUSION

For the foregoing reasons, the Court is urged to reconsider its denial of Aetna's Motion for Partial Summary Judgment, and, upon such reconsideration, to grant same.

KUTAK ROCK & HUIE

/s/ R. WILLIAM IDE

C. EDWARD DOBBS
ATTORNEYS FOR AETNA BUSINESS CREDIT, INC.

1200 Standard Federal Building
Atlanta, Georgia 30303
(404) 522-8700

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion and Brief upon Plaintiff's Attorneys of Record by depositing same in the U.S. Mail, postage prepaid, in an envelope properly addressed to:

W. Kent Bishop, Esq.
1835 First National Bank Tower
Atlanta, Georgia 30303

This 19th day of January, 1978.

C. EDWARD DOBBS

Chronological Events* from Official Bankruptcy Records of Georgia Paneling Supply, Inc., Bankrupt, No. B 74-1628A, to-wit:

(1) Bankruptcy Docket Sheets in B 74-1628A

(2) Application of the Trustee and Co-Attorney for the Trustee For Compensation with attached Affidavit and Exhibit A being his time records chronologically sequenced, which Application was filed February 27, 1978 and which Affidavit is only dated February, 1978 on Appellants' service copy.

(3) Affidavits of C. Edward Dobbs, Attorney at Law [for Aetna Business Credit, Inc.] with true and correct copies of timekeeping records, filed (1) February 15, 1978 and (2) February 21, 1978.

(4) Affidavit of Counsel [Freeman & Hawkins by Douglas L. Cronkright, partner] for Trustee In Support of Motion for expenses incurred on appeal and motions filed in connection therewith, filed March 2, 1978.

(5) Transcript of proceedings heard before Judge Norton, commencing at 2:00 p.m., February 14, 1978, filed March 1, 1978.

(6) Transcript of the proceedings heard before Judge Norton, commencing at 9:00 a.m. on March 6, 1978, filed March 14, 1978.

(7) Depositions of C. Edward Dobbs, John Pennington and Douglas L. Cronkright, taken before Bill Meigs on March 3, 1978, filed March 14, 1978.

Referee Norton's Calendar for September 19, 1977 and February 14, 1978 as available in his courtroom on the indicated dates

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*Note: All *underlinings* are petitioners'.

8/26/77 *Order* entered 8/25/77 by Hon. Richard C. Freeman. Accordingly, *this court's order of July 22, 1977 insofar as it applies to appellants' motion under Rule 60(b)(1), (2) and (3) is hereby VACATED and* the instant action is hereby ORDERED to *be REMANDED to the bankruptcy court for an evidentiary hearing* upon the question of *whether appellants can carry their heavy burden of demonstrating grounds for relief under rule 60(b)*(1), (2) or (3) which would warrant setting aside the judgment of the bankruptcy court of June 17, 1976. If such grounds are found, the bankruptcy judge is hereby directed to enter the appropriate findings of fact and conclusions of law and to apply to this court for leave to amend our mandate of affirmance to the extent that any conflict therewith may be found to exist.

Bankruptcy Docket, B74-1628A.

8/30/77 Tel. — Judge Norton's secretary .1

Exhibit A to Trustee's Affidavit, Feb. ___, 1978, (herein "Trustee's Affidavit")

9/2/77 *Application of Aetna* Business Credit, Inc. *for assessment of Legal Expenses* incurred on appeal rec'd and filed.

ORDER ENTERED that International Paper Co., Hampton Lumber Sales Co., Gold Rey Forest Products, Versapanel, Inc. and White Lumber Sales, Inc. be and appear at 8:00 a.m. September 19, 1977 at Room 546 U.S. Courthouse, Atlanta, Georgia why the relief prayed for in appl. should not be granted.

Bankruptcy Docket

9/8/77 ORDER AND NOTICE of Assignment of Hearing on Appellants' Remanded Motion under Rule 60(b) and Appl. of Aetna Business Credit for Assessment of Expenses Against Appellants in Room 546 U.S. Courthouse, Atlanta, Ga. September 19, 1977 8:00 a.m.

Bankruptcy Docket

9/9/77 Tel. — Judge Freeman's secretary .1

Trustee's Affidavit

9/9/77 *Motion of Trustee for Assessment of Expenses Incurred on Appeal and Motions Filed In Connection Therewith, rec'd and filed. Notice of Motion will be brought on for hearing* before the Honorable William L. Norton, Jr., at 8:00 a.m., on September 19, 1977, in Room 546 of the U.S. Courthouse, 56 Forsyth St., Atlanta, Ga. 30303, rec'd and filed.

Bankruptcy Docket

9/12/77 Order, re: motion date signed .5

Exhibit to Trustee's Co-counsel's Affidavit, served March 2, 1978, Time Slip No. 221 (herein "Freeman & Hawkins")

9/12/77 *ORDER ENTERED* that International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Versapanel, Inc., and White Lumber Sales, Inc., be and appear before this Court at 8:00 a.m., on September 19, 1977, in Room 546 of the United States Courthouse, 56 Forsyth Street, Atlanta, Georgia 30303, and then and there show cause, if any there be, why the relief prayed for in said Motion should not be granted.

Bankruptcy Docket

9/13/77 *Application by Appellants For Continuance* as to Order and Notice of Assignment of Hearing filed in the Clerk's Office September 8, 1977, rec'd and filed. Certificate of Service thereon.

Bankruptcy Docket

9/14/77 Conference with Cronkright re: Bishop's application to Norton for continuance .9

Exhibit B to Aetna's lawyer's Affidavit February 20, 1978 (herein Aetna's Affidavit)

9/14/77 Tel. — Cronkright and Judge Norton's secretary .2

Trustee's Affidavit

9/14/77 Response of Appellee to Appellants' Request for Continuance of Hearing on Rule 60(b) Motion, rec'd and filed.

Bankruptcy Docket

9/15/77 *Conference with Judge Norton and Pennington concerning upcoming Rule 60(b) motion hearing.* .5

Freeman & Hawkins No. 230

9/15/77 *Research and drafting of Order as requested by Judge.* 4.5

Freeman & Hawkins No. 228

9/15/77 Conference with Dobbs concerning application and hearing. .2

Freeman & Hawkins No. 229

9/15/77 *Presentation of Order to Judge,* rev. of same; corrections and revisions, return of same; filing of same; preparation for hearing with Pennington. 5.0

Freeman & Hawkins No. 227

9/15/77 Confer — Cronkright and *prepare Order* 4.7

Trustee's Affidavit

9/15/77 Review of Bishop's application for continuance Review of Trustee's response, correspondence and conferences. 1.3

Aetna's Affidavit

9/15/77 Conference w. Pennington re hearing .5

Aetna's Affidavit

9/15/77 Response of Appellee to Appellants' Request for Continuance of Hearing On Rule 60(b) Motion, rec'd and filed. Certificate of Service thereon.

Bankruptcy Docket

Q. [By Mr. Bishop] I would like for you to turn to a number of time slips [of Freeman & Hawkins] that appear to bear the date of September 15, 1977. I'll mark those as 227 through 230. *Would you please describe for me the conference with Judge Norton and John Pennington concerning the upcoming Rule 60B motion hearing* at the bottom of that page, 9/15/77, document 230?

A. [By Mr. Cronkright] *It was a conference* concerning the drawing up of an order for Judge Norton's court *at his request . . . and he asked us to take an order.* [Deposition Douglas L.

Cronkright, March 3, 1978 at page 79; emphasis added.]

Q. [By Mr. Bishop] Well, *did you call me or my office prior to going to see Judge Norton with Cronkright?*

A. [By Mr. Pennington] Well, I'm sure we didn't because you weren't there.

Deposition Pennington March 3, 1978 at page 24; emphasis added.

9/16/77 Additional research and preparation for hearing; *including call to* Bishop and *Judge Norton to advise them of change in Order* to be made by motion. 0.5

Freeman & Hawkins No. 234

9/16/77 *To town — confer — Judge and Cronkright* 1.6
Confer — Judge and Cronright[sic] and draft Order; prepare for hearing; *research* 6.2

Trustee's Affidavit

9/16/77 *Order entered Creditors' Application for continuation* and postponement for the reason of the conflict anticipated by counsel for Creditors is hereby *Denied.* Further that Creditors' Application for postponement for the reason that the Tr. has not been shown to be inadequate or incompetent with the result that Aetna Business Credit would be then not a party, is without merit or logic, their request for such reason is hereby *Denied.* Further Creditors for the reason that an order needs to first be entered incorporating all of the discovery documents in the related plenary actions is hereby *Denied.* Creditors' request for reservation by this Court of a two to thee week period for the hearing of their Rule 60(b) Motion is therefore hereby *Denied.* On Monday September 19, 1977, *the Court will confine its examination exclusively to evidence offered by Creditors which is of a character appropriate to a Rule 60(b) Motion, and as to new evidence, that which necessarily could not been discoverable prior to the hearing on May 18, 1976.*

Bankruptcy Docket

9/19/77 Notice of Appeal and *Request For Immediate Review* to the District Ct. to the Order of the Bankruptcy Judge of September 16, 1977, filed by International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Versapanel, Inc., (now known as Quinault Pacific Corp.) and White Lumber Sales, Inc. rec'd and filed.

Bankruptcy Docket

9/19/77 Motion of International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Versapanel, Inc., and White Lumber Sales, Inc., *For Stay Pending Appeal,* rec'd and filed.

Bankruptcy Docket

9/19/77 Appellants' Response to Aetna Business Credit, Inc.'s and the Trustee in Bankruptcy's Application For Assessment of Costs, rec'd and filed.

Bankruptcy Docket

9/19/77 *Motion* of International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Versapanel, Inc. and White Lumber Sales, *to Reassign Case,* rec'd and filed. Certificate of Service thereon.

Bankruptcy Docket

9/19/77 Hearing re 60(b) motion before Judge Norton 5.7
Confer — Cronkright and draft Order 4.9

Trustee's Affidavit

9/19/77 Preparation and attendance at 1st Session of hearing in objecting creditors' Rule 60(b) Motion; Meeting with Pennington for purpose of rev. posture in wake of hearing; preparation for next day's hearing. *Research and dictation of order for Court denying objector's motions* 11.0

Freeman & Hawkins No. 232

9/20/77 Q. [by appellants' counsel, Mr. Bishop] All right, on September, the second day of this hearing, it [an entry on Exhibt A to Application of the Trustee and Co-Attorney for the Trustee for Compensation] shows "hearing. 3.3 hours". I want you to look at that, if you would. *Now does that 3.3*

hours include the time that you and Judge Norton had breakfast together?

A. [by Mr. Pennington] I would not charge for having breakfast with Judge Norton, number one. Number two, *I don't recall having breakfast with him that day, although I have had breakfast with him before, and it could have been that day,* but if I in fact did, number one [sic], I did not discuss this proceeding because that would be very uncomfortable to me.

Q. Unethical? *Would it be unethical?*

A. Sir?

Q. Would it have been unethical to have breakfast — —

A. *For me to discuss this hearing with him before?*

Q. Yes.

A. *Yes. Sure.*

[Depo. of John C. Pennington, March 3, 1978 at pp. 27 and 28; emphasis added.]

9/20/77 "For the same reasons, *the drinking of coffee by the Judge at the Trustee's restaurant breakfast table does not form the basis for a disqualification, especially where the Trustee has sworn that the merits of the case were not discussed.*"

Trustee's Brief in Response to Federal Rules of Appellate Procedure 6(a) Petition

9/20/77 "The Court: This is getting ridiculous, Mr. Bishop. I will sustain the objection. Incidentally, 365 days a year, just about, I have breakfast in Gainesville, Georgia at about 5:30. *I don't have breakfast in Atlanta, Georgia with anybody,* if that's what you're trying to get to. *I really don't like or don't appreciate the attempt, apparently, to make this . . . to be something else. . . .*"

[Transcript hearing March 6, 1978 at p. 65; emphasis added.]

9/26/77 Q. [By Mr. Bishop] *Did you tell me on that date [September 26, 1977] that the intervenors would lose on their 60B motion?*

A. [By Mr. Cronkright] That would have been

my opinion. *It's very possible I would have expressed it to you.*

[Deposition, D. L. Cronkright, at p. 60, emphasis added.]

9/26/77 Extended conference with Bishop, Pennington and DLC *concerning possibilities of our withdrawal from case.* 2.5

Freeman & Hawkins No. 235

10/11/77 Additional Brief of International Paper Company, Hampton Lumber Sales Company, Quinault Pacific Corporation, White Lumber Sales, Inc., and Gold Rey Forest Products, Inc., required by Bankruptcy Court to Support Appellants' Motion Under Rule 60(b), FED. R. Civ. P., rec'd and filed.

Bankruptcy Docket

10/18/77 Conferences with Cronkright and Pennington re brief; Drafting extension order 1.2

Aetna's Affidavit

10/19/77 Order entered that the Trustee and Aetna Business Credit, Inc. shall file any and all briefs in connection with Appellant's remanded motion under Rule 60(b) on or before October 28, 1977.

Bankruptcy Docket

10/25/77 Notice of Appeal submitted to Honorable Richard C. Freeman from the Order of the Bankruptcy Judge entered on September 16, 1977.

Bankruptcy Docket

10/31/77 Order entered 10/28/77 that the Trustee and Aetna Business Credit, Inc. may file any and all briefs in connection with Appellants' remanded motion under Rule 60(b) on or before November 7, 1977.

Bankruptcy Docket

11/1/77 *Confer — Judge Norton* .2

Trustee's Affidavit

11/2/77 *Tel. — Judge* .1

Trustee's Affidavit

11/7/77 Trustee's, John C. Pennington, Reply to Brief in Support of Appellants' Rule 60(b) Motion rec'd and filed

Bankruptcy Docket

11/9/77 Motion of Appellee Aetna Business Credit, Inc., To Dismiss Appeal and For Attorney's Fees, rec'd and filed.
Brief of Appellee Aetna Business Credit, Inc., In Support of Motion to Dismiss Appeal and For Attorney's Fees, rec'd and filed. Certificate of Service thereon.

Bankruptcy Docket

11/14/77 Motion of Appellee Aetna Business Credit, Inc. to dismiss appeal and for attorney's fee submitted to Honorable Richard C. Freeman, United States District Judge.

Bankruptcy Docket

11/16/77 Tel. — Judge Norton's secretary .1

Trustee's Affidavit

11/16/77 Appellants Copies of Exhibits Cited in The Additional Brief Filed October 11, 1977, rec'd and filed. Submitted to Honorable Richard C. Freeman to be placed with the file.

Bankruptcy Docket

11/22/77 Response of Appellants with brief attached, International Paper Company Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Versapanel, Inc., and White Lumber Sales, Inc., to Aetna's Motion to Dismiss Appeal of August 8, 1977 and for Attorney's Fees, rec'd and filed. Certificate of Services thereon. (submitted to Honorable Richard C. Freeman to be placed with file)

Bankruptcy Docket

11/22/77 *Telephone conversation with Dobbs. Telephone conversation with Pennington regarding Order on 60(b) Motion pending before Norton.* 1.0

Trustee's Co-Counsel's Time Records (herein "II Freeman & Hawkins") 265 served Feb. 28, 1978.

12/12/77 Discussion of status of case with Ed Dobbs: *agreement to do Order.* .3

II Freeman & Hawkins No. 264

? *Office conference with Pennington concerning handling of Order for Judge Norton.* ?

II Freeman & Hawkins No. 263

12/14/77 *Conference with Dobbs concerning Judge Norton's Order . . .* .2

II Freeman & Hawkins No. 270

12/19/77 Conference with John Pennington concerning Order for Judge Norton. .2

II Freeman & Hawkins No. 269

12/19/77 Confer — Cronkright .5

Trustee's Affidavit

12/20/77 *Telephone conference with Dobbs regarding Judge Norton's Order opinion written. . .* .2

II Freeman & Hawkins No. 268

12/20/77 *Delivery of Norton's Order and pick-up of draft of opinion* .3

II Freeman & Hawkins No. 267

12/20/77 Receipt of order from Judge Norton and *telephone review of revisions in Order for Judge Norton's signature with Dobbs and discussion of law concerning application for attorney's fees.* 1.2

II Freeman & Hawkins No. 274

12/20/77 Review and *editing* of *proposed Order for Judge Norton's signature provided by Ed Dobbs.* 1.3

II Freeman & Hawkins No. 273

12/21/77 Tel. — Dobbs .1

Trustee's Affidavit

Mr. Bishop: Yes sir. The Flashman [sic: *Fleischman Distilling Corp. v. Maier Brewing Co.*, 87 S. Ct. 1404 (1967)] case and the Hill case, or Hall case [*Hall v. Cole*, 93 S. Ct. 1943 (1973)], but what I wanted to do was to respond to each one of these individual items as to what we were doing and what the purpose of doing that was.

Now, for example, the brief that this Court entered on the 60(b) motion —

The Court: Brief?

Mr. Bishop: Excuse me. The opinion that this

Court entered on January 5, 1978, Mr. Dobbs says was 40 pages long. My associate counted up the —

The Court; Well, it was quite long.

Mr. Bishop: *I believe Mr. Dobbs probably drafted that or something like that.*

The Court: *He certainly typed it.* I don't consider that he drafted it.

[Transcript hearing February 14, 1978 at p. 83; emphasis added.]

The Court: ******We even discussed it.***

Transcript March 6, 1978 at p. 25

12/20/77 *Order entered that the Motion* of International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Versapanel, Inc. and White Lumber Sales, Inc., *for relief under Rule 60(b) (1), (2) and (3)* of the Federal Rules of Civil Procedure, which Motion was *remanded to this Court for determination* by order of the Honorable Richard C. Freeman, U.S. District Judge, on August 25, 1977, be, and the same hereby is in all respects, *DENIED; and it is further Ordered that a hearing on the Application of Aetna* Business Credit, Inc. for an assessment of expenses incurred by it on appeal *and on the Application of the Trustee* for an assessment of expenses incurred by him on appeal shall be heard before this Court at 2:00 P.M., on the 19th day of January 1978, in Room 546 of the U.S. Courthouse, 56 Forsyth St., Atlanta, Georgia; and it is further Ordered that Appellants shall bear all costs incurred in connection with the hearing on their Motion. *The time for appeal from this Order shall run from the date of entry of the Opinion to be filed in connection therewith.*

Bankruptcy Docket

12/28/77 *Notice of Appeal to the District Court from the Order of the Bankruptcy Judge entered 12/20/77 filed by International Paper Company, Hampton Lumber Sales Co., Gold Rey Forest Products, Inc., Versapanel, Inc. and White Lumber Sales, Inc. rec'd and filed.*

Bankruptcy Docket

1/5/78 *OPINION re: Remanded Motion* of International Paper Company, Hampton Lumber Sales Company, Gold Rey Forest Products, Inc., Versapanel, Inc. and White Lumber Sales, Inc. (appellants), which was previously filed with the U.S. District Court pursuant to Rule 60(b) of FRCP and upon application of Aetna Business Credit, Inc. for an assessment of expenses incurred by it on appeal and upon the application of John C. Pennington, Trustee for an assessment of expenses incurred on appeal DENYING appelants' Motion *and the Court will schedule a hearing upon the Trustee's application and that of Aetna for an assessment of attorney's fees* against appellants, filed. Copy to Doublas L. Cronkright, (Attorney for turstee) and W. Kent Bishop (Attorney for appellants) — *Mr. C. Edward Dobbs, Attorney for Aetna has a copy.* 1/6/78 Copy to Attorney for bankrupt 1/6/78 (See Notice of Reassignment of hearing on appls. for assessment of expenses on other side of this docket.)

Bankruptcy Docket

JUDGE NORTON'S CALENDAR
MONDAY, SEPTEMBER 19, 1977
ROOM 546

8:00 A.M.

B74-1628A GEORGIA PANELING SUPPLY, INC.
Appellants' Remanded Motion Under Rule 60(b)
Application of Aetna Business Credit for Assessment of Expenses Against Appellants
International Paper, et al, show cause

10:00 A.M.

B76-819A ARTCRAFT GREETING CARD
Application for Authority to Settle Law Suite with Trust Company Bank

B75-4345A PINE GATE ASSOCIATES, LTD.
Hearing on Continuation of Stay of Judgment;
Confirmation Hearing

2:00 P.M.

B77-2014A JIM ROGERS: Alton L. Hawk

B77-2022A ANNIE LEE DIXON: J. Stratton Leedy
a/k/a ANNIE L. DIXON

B77-2023A STEVEN G. LEONARD: R. Allen Hunt

B77-2024A RICHARD JOHN SMITH: Harry A. Sneed

B77-2025A WILLIAM JACKSON HAMILTON, III: Leon L. Rice III

B77-2026A RITA DELAINE SAMUELS: Frank G. Smith
a/k/a RITA JACKSON SAMUELS
a/k/a RITA DELAINE JACKSON

B77-1995A DENNIS HOWARD WILLS: Lynwood Maddox

2:30 P.M.

B77-2027A NETTIE W. RAINEY: James E. Thompson
a/k/a NETTIE RAINEY

B77-2028A FELTON RAINEY: James E. Thompson
a/k/a FELTON THOMAS RAINEY

B77-2033A JAMIE ROBERT ANTHONY, JR.: Thomas E. Raines

B77-1876A MRS. MYNZINE J. CAUDILL: Ralph C. McBride

B77-1877A DENNIS CAUDILL, JR.: Ralph C. McBride

B77-2125A MICHAEL JAY GORDON: Richard Johnson

B77-2127A CHARLES ALLEN MC MURRAY: Bruce M. Rubin

B77-2128A CRYSTAL C. ST. CLAIRE: Ken Gordon

B77-2129A LINDA HASTY BARRON: Colin McDonald

B77-2160A DAVID MILTON AMBROSE: Donald F. Walton

3:00 P.M.

B77-2066A LLOYD ROBERT MADANSKY: Marshall H. Jaffe

B77-2067A CARYN STEPHENS MANDANSKY: Marshall H. Jaffe
a/k/a CARYN LEE STEPHENS

B77-2069A JERRY JEANNETTE ALLEN: Lavigno & Puls

B77-2073A SOUTHWEST CONSTRUCTION COMPANY: W. M. Welch

B77-2130A BRENDA GALE TICE: Robert Montgomery

B77-2131A JAMES EDWARD COLE, JR.: Philip J. Wydro

B77-2138A BILLY ANDY MC PHERSON: William D. Harris

B77-1983A MELVIN RAY BEARSON: William Brackett

3:30 P.M.

B77-2024A RICHARD JOHN SMITH
Show Cause — Restraining Order

B76-1435A JAMES L. BENTLEY
Objection to Exempt Property and Amended Schedule

B75-3024A THE CAR DOCTOR, INC.
Final Meeting of Creditors and Objection to Claims 2, 13 and 17

B75-3955A HENRY W. SCHLACTER—Final Meeting, Objection to Claim 4.

JUDGE NORTON'S CALENDAR FOR TUESDAY, FEBRUARY 14, 1978 ROOM 546

2:00 P.M.

B74-1628A GEORGIA PANELING SUPPLY, INC.

Hearing on Assessment of Expenses Incurred by Aetna Business Credit and by the Trustee on Appeal

Application for Order Directing Payment of Costs and for Assessment of Expenses Incurred by it on Appeal

Application for Assessment of Expenses Incurred by it in Connection with Appellants Remanded Rule 60(b) Motion

CRITIQUE OF
IN RE DEKLE, 308 So.2d 5 (FLA. 1975)
and
IN RE BOYD, 308 So.2d 13 (FLA. 1975)

On January 30, 1974 the Supreme Court of Florida published a decision in *Gulf Power Co. v. Bevis*, 289 So.2d 401 (Fla. 1974) amid newspaper reports of improprieties involving at least two of the five justices of the Court. A "Judicial Qualifications Commission" created under Article V, Section 12 of the *Florida Constitution* initiated an investigation which resulted in a report calling for the removal of Justices Dekle and Boyd. They appealed to a specially composed Supreme Court which in full length opinions issued public reprimands. *Gulf Power Co. v. Bevis* had been modified by another opinion published in 296 So.2d 482 (Fla. 1974) to express neither the originally circulated opinions of Justices Dekle or Boyd.

In re Boyd, 308 So.2d 13 (Fla. 1975) found that *Gulf Power Co. v. Bevis* was argued orally on June 7, 1973 and tentatively decided immediately afterward in favor of the utility with Boyd assigned to write the majority opinion. It was undenied that on July 16, 1973 Justice Boyd and the utility's lawyer, Edwin Mason, played golf together. Mason testified that at an earlier golf engagement Boyd had asked him for a draft opinion to use as the majority opinion and that on July 16th the draft was handed to Boyd. Boyd denied he solicited the draft opinion or that Mason handed it to him. Boyd did testify that he found it in his office, and he and his research aide flushed it down the toilet after the aide and an aide to the Chief Justice committed parts of it to memory to "trap somebody." On October 19, 1973, Boyd circulated an opinion coming to a conclusion contrary to the court's vote after oral argument on June 7, 1973. Justice Dekle then filed as his dissent an opinion which Boyd's aide and the Chief Justice's aide thought bore a striking resemblance to the Mason draft opinion. In time Dekle's dissent became the majority opinion and Boyd's majority opinion became the dissent.

In re Dekle, 308 So.2d 5 (Fla. 1975) further found that in the latter part of July, 1973 Mason delivered the draft opinion to Justice Dekle telling him that he (Mason) had

just delivered one to Boyd for use in preparing the majority opinion. Dekle testified he accepted it upon Mason's representation that Boyd had it thinking it was a duly filed amicus brief. After Dekle's disssent became the majority opinion, Chief Justice Carlton told Dekle that Carlton's aid had said that Dekle's opinion was substantially similar to an *ex parte* memorandum that had been improperly put in Boyd's possession and it would be advisable for Dekle to modify the language. Dekle did so (289 So.2d 401). Only from the Chief Justice, testified Dekle, did he learn the memo was improper.

An additional dimension to the *Dekle* case occurred on November 30, 1973 after Mason had personally called on Dekle to expedite the decision. Dekle went to Justice McCain's office and had his secretary prepare a note to McCain which the Supreme Court characterized as an appearance that Dekle was lobbying McCain for support of Dekle's dissent. (It was this note which was leaked to the press which created the public uproar.)

The public reprimands issued by the Florida Supreme Court to Justices Boyd and Dekle were predicated on violation of Canon 3(A) (4) of the *Code of Judicial Conduct.**

The Court held that Boyd had a duty to disclose he had received an *ex parte* communication concerning a pending case and to disown the *ex parte* communication openly and forthrightly. The Court accepted Boyd's testimony that he had not solicited the draft opinion despite the dissenter's view that the weight of the evidence indicated Boyd had solicited the draft opinion from Mason, had panicked about the improprieties in an election year, and discarded pro-utility drafts for an anti-utility opinion, and concocted wild tales to cover up. The Court found much of Boyd's conduct to have been "bizaree" but found "no clear and convincing proof" that he actually solicited the memo from Mason and used it improperly.

As to *Dekle*, the Court noted that (a) the Judicial Qualifications Commission had conceded that Mason's *ex parte* draft opinion had no effect on Dekle's vote in the case, (b) Dekle had testified that as a Florida state circuit judge, it

*Canon 3A(4) was called to the Georgia Paneling Supply, Inc. referee's attention on March 6, 1978. Transcript March 6, 1978 at page 20.

was not unusual for a judge to receive from counsel in pending cases legal memorandum for use in preparing proposed orders or judgments, and (c) "we are unable to infer wilful and deliberate corrupt misconduct". Nevertheless, the Court stated "[W]e do agree he was lax, obtuse and insensitive", "the affair smacks of the appearance of evil", and "obtuseness and raw ineptness in the matter cannot be condoned or go uncondemned". The dissent quoted from *In re Kelly*, 238 So.2d 565 as follows:

> "Conduct unbecoming a member of the judiciary may be proved by evidence of specific major incidents which indicate such conduct, or it may also be proved by evidence of an accumulation of small and ostensibly innocuous incidents which, when considered together, emerge as a pattern of hostile conduct unbecoming a member of the judiciary."

For a postscript, Article V, Section 12(f) of the *Florida Constitution* was amended in November, 1976 to read:

> "Malafides, scienter or moral terpitude on the part of a justice or judge shall not be required for removal from office of a justice or judge whose conduct demonstrates a present unfitness to hold office."

This amendment was held not to have retroactive effect in Florida, *In re Inquiry Concerning a Judge* [Traunton, a non lawyer][sic], 357 So.2d 172 (Fla. March 16, 1978.

In the *Traunton* case, the Judicial Qualifications Commission recommended removal from office for a large number of offences, including "he conducted *ex parte* conferences with a defendant in a case before him and refused to execute judgment against him". 357 So.2d at 177. Judge Traunton was administered a public reprimand.

AFFIDAVIT
SANDRA JEAN THOMASON
MARCH 22, 1978

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

In the Matter of:

GEORGIA PANELING SUPPLY, INC., Bankrupt

Bankruptcy No. B74-1628

STATE OF GEORGIA
COUNTY OF FULTON

I, SANDRA JEAN THOMASON, being duly sworn, hereby depose and say as follows:

1.

I am a resident of DeKalb County, Georgia and am over twenty-one (21) years of age.

2.

On February 28, 1978, I was serving as a temporary secretary for W. Kent Bishop at 1835 First National Bank Tower, Two Peachtree Street, N.W., Atlanta, Georgia 30303.

3.

As of the date of this Affidavit I am no longer serving as Mr. Bishop's secretary.

4.

At approximately 3:30 p.m. February 28, 1978, I saw a young lady deliver a brown envelope to the receptionist at Moffett, Henderson & Bishop, 1835 First National Bank Tower, Atlanta, Georgia. I saw the receptionist take the brown envelope to Mr. Bishop's office immediately after receipt, and I heard her state to Mr. Bishop that it was a hand-delivered document for him.

5.

After ten or fifteen minutes, Mr. Bishop called me into his office, said the documents were time slips which indica-

ted that the recent order and opinion of Bankruptcy Judge Norton had in fact been drafted by attorneys for "Aetna" and the "Trustee," and Mr. Bishop asked me to make a photo copy of each of the enclosed pages for "Mr. Swank."

6.

After making the photocopies I brought the uncollated copies (along with the service copy) back to my desk where I was sitting when the first of three telephone calls from "Mr. Cronkright" to Mr. Bishop was received at our switchboard. I recall hearing the switchboard operator indicate that it was a call for Mr. Bishop, and I recall Mr. Bishop picking up the telephone and conversing. I believe this first call came in about 4:00 p.m.

7.

After the first telephone call, Mr. Bishop asked me to reattach the original time slips for redelivery to Mr. Cronkright because he had told Mr. Bishop he needed to file them in court.

8.

About this time, Mr. Bishop pointed out that certain of the photocopied time slips were almost illegible and asked me to compare them side-by-side with the originals.

9.

I was at my desk making darker the impressions on those few nearly illegible photocopies when Mr. Cronkright's second telephone call to Mr. Bishop came into the switchboard. I estimate the time as being between 4:10 and 4:15 p.m.

10.

Not more than two minutes later Mr. Cronkright called for the third and last time. Mr. Bishop came out of his office immediately after the call, asked me to deliver the original to the messenger who had arrived at our office minutes before and Mr. Bishop asked me to tell her that the holes in the top of the document and the binding meant that photocopies of the documents had been made.

11.

I realize that this Affidavit may be used in certain proceedings in the U.S. District Court pertaining to the

delivery of the time slips from Freeman and Hawkins on or about 3:30 p.m. February 28, 1978.

12.

Further the Affiant sayeth not.

/s/ SANDRA JEAN THOMASON

Sworn to and subscribed before me this 22nd day of March, 1978.

/s/
NOTARY PUBLIC
My Commission Expires: Notary Public, Georgia, State at Large. My Commission Expires Feb. 12, 1979.

TABLE I

ANALYSIS OF STIPULATION BETWEEN FREEMAN & HAWKINS AND APPELLANTS

	D.L. Cronkright dealing w. Ct. of Judges HRS.	#	D.L. Cronkright dealing w. J.C. Pennington HRS.	$	D.L. Cronkright dealing w. C.E. Dobbs HRS.	$	Freeman & Hawkins inter se, travel HRS	$	D.L. Cronkright on pure bankruptcy HRS	$	Other HRS	$	Total HRS	$
I. 60(b) MOTION														
A. 5/21/77 - 7/24/77	0.8 [1]	$400.00 [2]	25.7 [3]	$1,285.00	1.8 [3]	$90.00	0.5 [4]	$25.00	0.9 [5] 10.7 [6]	$45.00 535.00	39.4 [7]	$1,970.00	79.8 [8]	$3,990.00
B. 7/25/77 - 8/26/77	0.3 [9]	15.00					0.9 [10]	45.00	0.9 [11]	45.00	15.5 [12]	775.00	17.6 [13]	880.00
C. 8/27/77 - 1/5/78	13.7 [14] 0.9 [15]	685.00 50.00	12.2 [16]	610.00	2.0 [17]	100.00	1.5 [18] 0.2 [20] 0.5 [21]	75.00 10.00 25.00			38.7 [19] 2.4 [22]	1,935.00 120.00	72.3 [23]	3,615.00
	15.7	$790.00	37.9	$1,895.00	3.8	$190.00	3.6	$180.00	12.5	$625.00	96.0	$4,800.00	169.7	$8,485.00
II. APPEAL FROM 6/17/76 BJ APPROVAL OF SETTLEMENT	0.6 [24]	30.00	27.0 [25] 1.0 [26]	1,350.00 50.00	3.0 [27] 0.5 [28]	150.00 25.00	0.8 [29] 1.9 [30] 5.2 [31] 2.9 [32]	40.00 95.00 260.00 145.00	0.4 [33] 0.5 [34] 7.8 [35] 0.2 [36]	20.00 25.00 390.00 10.00	21.2 [37] 3.8 [38] 28.9 [39]	1,060.00 190.00 1,445.00	105.7 [40]	5,285.00
	0.6	$30.00	28.0	$1,400.00	3.5	$175.00	10.8	$540.00	8.9	$445.00	53.9	$2,695.00	105.7	$5,285.00
III. APPLICATION FOR AWARD OF ATTYS FEES			17.8 [41]	890.00	5.1 [42]	255.00					4.0 [43] 12.6 [44]	200.00 630.00	39.5 [45]	1,975.00
	—	—	17.8	$890.00	5.1	$255.00	—	—	—	—	16.6	$830.00	39.5	$1,975.00
IV. C75-1540A PENDING IN NDGA, filed 8/6/75			16.2 [46]	810.00	18.1 [47]	905.00			16.1 [48]	805.00	90.0 [49] 5.5 [50] 14.1 [51]	4,500.00 275.00 705.00	160.0 [52]	8,000.00
	—	—	16.2	810.00	18.1	905.00	—	—	16.1	805.00	109.6	5,480.00	160.0	8,000.00
TOTALS	16.3	$820.00	99.9	$4,995.00	30.5	$1,525.00	14.4	$720.00	37.5	$1,875.00	279.1	$13,805.00	474.9	$23,745.00

1/ FOOTNOTES NEXT PAGE.

FOOTNOTES TABLE I Analysis of Stipulation Between Freeman & Hawkins and Appellants)

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*Hourly rate $50.00 Stipulation Paragraph V.
[1] Stipulation Paragraph No. I (A)(4)
[2] *Id.* I(A)(1)
[3] *Id.* I(A)(2)
[4] *Id.* I(A)(7)
[5] *Id.* I(A)(5)
[6] *Id.* I(A)(6)
[7] *Id.* I(A)(3)
[8] *Id.* I(A)(8)
[9] *Id.* I(B)(2)
[10] *Id.* I(B)(4)
[11] *Id.* I(B)(5)
[12] *Id.* I(B)(1)(.8) and I(B)(3) (14.7) being work "on the second 60(b) motion filed by appellants to correct a substantial error of fact in the District Court Order of July 22, 1977".
[13] *Id.* I(B)(6)
[14] *Id.* I(C)(4)
[15] *Id.* I(C)(5)
[16] *Id.* I(C)(1)
[17] *Id.* I(C)(2)
[18] *Id.* I(C)(6)
[19] *Id.* I(C)(3)
[20] *Id.* I(C)(7)
[21] *Id.* I(C)(8)
[22] *Id.* I(C)(9)
[23] *Id.* I(C)(10)
[24] *Id.* II(A)(1)
[25] *Id.* II(A)(10)
[26] *Id.* II(A)(4) on motion to extend time to appeal to Fifth Circuit.
[27] *Id.* II(A)(2)
[28] *Id.* II(A)(5) on motion to extend time to appeal to Fifth Circuit.
[29] *Id.* II(A)(9) organizing files
[30] *Id.* II(A)(10) trip.
[31] *Id.* II(A)(11) conference with ex-employee J. E. Sawhill.
[32] *Id.* II(A)(16) conference with partners.
[33] *Id.* II(A)(12)
[34] *Id.* II(A)(13) on the subject of alleged voidable preference received by International Paper Company.
[35] *Id.* II(A)(14)
[36] *Id.* II(A)(15)
[37] *Id.* II(A)(3)
[38] *Id.* II(A)(6)
[39] *Id.* II(A)(7) on motion to extend time to appeal to Fifth Circuit.
[40] *Id.* II(B)
[41] *Id.* III (1)
[42] *Id.* III (2)
[43] *Id.* III (3)
[44] *Id.* III (4)
[45] *Id.* III (5)
[46] *Id.* IV (3)
[47] *Id.* IV (4)

[48] *Id.* IV (5)
[49] *Id.* IV (1) time attending depositions noticed in plenary action
[50] *Id.* IV (2) time appearing in court re plenary action
[51] *Id.* IV (6)
[52] *Id.* IV (7)

TABLE II

ANALYSIS OF TRUSTEE'S APPLICATION FOR FEE AWARD

EXHIBIT "A" Page	Period	J.C. Pennington dealing w. court officials HRS	$	J.C. Pennington dealing w. D.L. Cronkright HRS	$	J.C. Pennington dealing w. C.E. Dobbs HRS	$	J.C. Pennington dealing w. DLC & CED at same time HRS	$	J.C. Pennington at depositions HRS	$	Other HRS	$	Total HRS	$
1	6/9/76 - 12/14/76	—	—	(12) 10.2	51000	(7) 1.0	5000	(2) 2.4	12000	—	—	2.7	13500	16.3	81500
2	12/20/76 - 4/19/77	—	—	(20) 8.5	42500	(3) 0.3	1500	—	—	(4) 9.5	47500	0.4	2000	18.7	93500
3	4/25/77 - 6/15/77	—	—	(21) 14.9	74500	(5) 0.8	4000	—	—	(1) 4.3	21500	3.5	17500	23.5	1,17500
4	6/16/77 - 9/12/77	(2) 0.2	1000	(19) 9.6	48000	(2) 0.4	2000	(2) 9.0	45000	—	—	8.4	42000	27.6	1,38000
5	9/14/77 - 11/4/77	(5) 8.3	41500	(13) 17.1	85500	(2) 0.3	1500	(1) 4.6	23000	—	—	23.2	1,16000	53.5	2,67500
6	11/7/77 - 2/15/78	(1) 0.1	500	(5) 6.4	32000	(1) 0.1	500	(1) 1.0	5000	—	—	1.6	8000	9.2	46000
	TOTAL	(8) 8.6	43000	(90) 66.7	3,33500	(20) 2.9	14500	(6) 17.0	85000	(5) 13.8	69000	39.8	1,99000	148.8	7,44000

TABLE III

ANALYSIS OF AETNA'S APPLICATIONS FOR FEE AWARDS

	C E Dobbs dealing w Court or Judges HRS	$	C E Dobbs dealing w J C Pennington HRS	$	C E Dobbs dealing w D L Cranbright HRS	$ [1]	Outside Counsel later ES, double counting HRS	$	Remarkably objectionable - specific HRS	$	Other HRS	$	TOTAL HRS	$
"B" 60 (b) MOTION														
5/31/77 - 6/24/77 p 1					0.3 [2]	16.50	1.4 [3]	77.00	0.3 [4]	16.50	9.5	522.50	11.5	632.50
2							0.6 [5]	33.00	0.2 [6]	11.00	1.4	77.00	2.2	121.00
3							7.4 [7]	407.00			2.7	229.50 [8A]	10.1	654.50
4							3.0 [8]	165.00					3.0	165.00
	—	—	—	—	0.3	16.50	12.4	682.00	0.5	27.50	13.6	829.00	24.8	1,553.00
7/25/77 - 8/26/77	—	—	—	—	—	—	—	—	—	—	—	—	—	—
8/27/77 - 2/16/77														
PAGE "S" [9]	0.5 [10]	27.50	0.5 [11]	27.50	0.9 [12]	49.50			0.3 [13]	16.50	0.5 [15]	27.50	3.0	165.00
									0.5 [14]	16.50				
p 6									4.0 [16]	220.00	12.2 [17]	726.00	17.2	946.00
7											2.0 [18]	110.00	2.0	110.00
8			1.0 [19]	55.00	0.7 [20]	38.50			0.2 [21]	11.00	0.3 [22]	16.50	2.2	121.00
9			0.2 [23]	11.00	0.2 [24]	11.00			2.0 [25]	110.00	0.2 [26]	11.00	2.6	143.00
10											0.5 [27]	27.50	0.5	27.50
	0.5	27.50	1.7	93.50	1.8	99.00	—	—	6.8	374.00	16.7	918.50	27.5	1,512.50
	0.5	27.50	1.7	93.50	2.1	115.50	12.4	682.00	7.3	401.50	30.3	1,747.50	54.3 [28]	3,066.50 [29]
Reconciliation [30]														
Less p "S" [31]													- 3.0	165.00
Discrepancy													- 3.2	176.00
													48.1 [32]	2726.50 [33]
"A" APPEAL														
FROM 6/21/76			0.2 [34]	8.00 [35]			0.4 [36]	26.00 [37]	27.5 [38]	1,237.50 [41]	—	—	28.1	1,271.50
			0.3 [39]	13.50 [40]					0.5 [42]	22.50	—	—	0.8	46.00
							0.5 [43]	32.50 [44]			—	—	0.5	32.50
							1.0 [45]	65.00 [46]			—	—	1.0	65.00
	—	—	0.5	21.50	—	—	1.9	123.50	28.0	1,270.00	—	—	30.4	1,415.00
"C" APPLICATION									3.5	210.00 [47]	3.0	180.00	6.5	390.00
FOR AWARD [48]									5.0	300.00			5.0	300.00
	—	—	—	—	—	—	—	—	8.5	510.00	3.0	180.00	11.5	690.00
TOTALS	0.5	27.50	2.2	115.00	2.1	115.50	14.3	805.50	43.8	2,181.50	27.8 [50]	1,598.50 [49]	90.00	4,833.50 [51]

[1] Footnotes NEXT Page

FOOTNOTES TO TABLE III (Analysis of Aetna's Applications for Fee Awards)

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[1] C. E. Dobbs time was billed at $55.00 per hour. Transcript 3/6/78 at p. ___.

[2] Affidavit 2/21/78 at p. 1, time slip No. 2.

[3] Affidavit 2/21/78 at p. 1, time slip No. 2 (Herbert Falk, Falk, Roth & Curruthers, Greensboro, North Carolina, counsel to Aetna in North Carolina, see Deposition, T. C. Duke, Volume I, 6/15/77 at p. ___.); No. 2 (R. William Ide, III, partner in C. Edward Dobbs' law firm at the time, Transcript 3/6/78 at p. ___,) No. 4 (Kenneth Greene, Falk, Roth & Curruthers).

[4] Affidavit 2/21/78 at p. 2, time slip No. 1 (Kenneth Greene), No. 2 (Kenneth Greene), No. 3 (R. William Ide, III).

[5] Cf. Affidavit 2/21/78 at p. 3, time slips No. 3 and 4 (C. Edward Dobbs) with No. 1 and 2 (R. William Ide, III).

[6] Cf. Affidavit 2/21/78 at p. 4 with p. 3, time slip No. 2.

[7] Affidavit 2/21/78 at p. 1, time slip No. 1 (Review Trustee's brief).

[8] Affidavit 2/21/78 at p.4 (Drafted cc)

[8A] Hourly rate R. William Ide, III for 2.7 hours was $85.00 per hour. Transcript 3/6/78 at ___.

[9] Affidavit of 2/21 and 2/15 are identical re first 4 pages and last 4 pages. There is a 5th page in 2/15 that is missing from 2/21: it contains reference to conferences and correspondence on 9/15/77, raising the possibility Aetna was involved with ex parte conferences at 60(b) hearing, although Aetna has denied it.

[10] Affidavit 2/15, p. 5, time slip No. 2.

[11] Affidavit 2/15, p. 5, time slip No. 4.

[12] Affidavit 2/15, p. 5, time slip No. 1.

[13] Affidavit 2/15, p. 5, time slip No. 2. (review of Trustee's response)

[14] Affidavit 2/15, p. 5, time slip No. 3. (call from William C. Humphreys, Jr. re hearing)

[15] Affidavit 2/15, p. 5, time slip No. 2.

[16] Affidavit 2/21/78, p. 6, time slip 3 (research re: dismissal of appeal) C. Edward Dobbs retracted attorneys fee for this. Transcrip 2/14/78 at p. ___.

[17] Affidavit 2/21/78, page 6, rest of time slips.

[18] Affidavit 2/21/78, page 7.

[19] Affidavit 2/21/78, page 8 includes conference with Douglas L. Cronkright, too.

[20] Affidavit 2/21/78, page 8.

[21] Affidavit 2/21/78, page 8, time slip 3 (drafting extension order)

[22] Affidavit 2/21/78, page 8.

[23] Affidavit 2/21/78, page 9, time slip 1

[24] Affidavit 2/21/78, page 9, time slip 3

[25] Affidavit 2/21/78, page 9, time slip 2

[26] Affidavit 2/21/78, page 9, time slip 1

[27] Affidavit 2/21/78, page 10.

[28] Total hours C. Edward Dobbs, 45.4, Transcript 3/6/78 at ___. Total hours R. William Ide, III, 2.7, Transcript 3/6/78 at ___.

[29] Total paid by Aetna:

C. Edward Dobbs	$2,497.00
R. William Ide, III	229.50
Total	$2,726.50

[30] Page 5 in Affidavit 2/15/78, but not in Affidavit 2/21/78

[31] Affidavit 2/21/78, Exhibit A, page 1.

[32] Affidavit 2/21/78, Exhibit A, page 1.

[33] Affidavit 2/21/78, Exhibit A, page 3.

[34] C. E. Dobbs' hourly rate $45.00 on computer printout.

[35] Affidavit 2/21/78, Exhibit A, page 3.

[36] Affidavit 2/21/78, Exhibit A, page 2, conference called re: Walter E. Heller & Co. v. Aetna Business Credit, Inc., C75-215A, 2/15/75.

[37] Affidavit 2/21/78, Exhibit A, page 4.

[38] C. Edward Dobbs' hourly rate $40.00 on computer printout

[39] C. Edward Dobbs' hourly rate $65.00 on computer printout

[40] From these totals were subtracted the p. 5 amount, and the discrepancy, shown in the 60(b) time reconciliation.

[41] C. Edward Dobbs' hourly rate $60.00

[42] Affidavit 2/21/78 at Exhibit C, page 1.

[43] Total of $4,831.50

Plus	27.15	costs re appeal
	157.00	costs re 60(b)
	$5,015.65	

TABLE IV.

COMPARATIVE ANALYSIS OF FEE AWARD

	FREEMAN & HAWKINS TRUSTEE'S CO-COUNSEL [1]	JOHN C. PENNINGTON TRUSTEE'S COUNSEL [sic]	AETNA BUSINESS CREDIT, INC. (Kutak Rock Hole)	TOTALS
I. 60(b) Motion				
A. 5/31/77 - 7/24/77	3,99000	(61500 [3])	1,55300 [5]	6,15800
B. 7/25/77 - 8/26/77	88000	(30500 [3])	—	1,18500
C. 8/29/77 - 1/5/78	3,61500	(92000 [3])	1,51250 [5]	6,04750
			(33900) [6]	(33900)
	8,48500	1,84000 [3]	2,71650 [7]	13,05150
II. Appeal from BJ's 6/17/76 Order	5,28500	53000 [3]	1,41600 [7] [8]	7,23100
			(100) [9]	(100)
	5,28500	53000 [3]	1,41500	7,23000
III. Application to BJ for Fee Award	1,97500	27500 [3]	69000 [7]	2,94000
			13065 [7]	13065
	1,97500	27500 [3]	82065	3,07065
IV. C75-1540A PENN. v. AETNA	8,00000	98000 [3]	—	8,98000
	8,00000	98000 [3]	—	8,98000
Allocable	23,74500	3,62500 [3]	4,96516	32,33516
Unallocable	—	3,81500 [4]	—	3,81500
ERROR	—	—	18215 [10]	18215
	23,74500	7,44000 [3]	5,14730 [7]	36,33230

1/ Footnotes Next Page

FOOTNOTES TO TABLE IV (Comparative Analysis of Fee Awards)

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[1] Memorandum BJ filed 11/14/78 at pp. 3-4.

[2] Guess, based on Trustee's affidavit of February, 1978 and Exhibit A thereto.

[3] Memo BJ filed 11/14/78 at pp. 5-6.

[4] Determined by subtracting figures marked by [3] from total award of $7,440.00.

[5] Based on Affidavit of C. Edward Dobbs 2/15, 21, 1978 and Affidavit of R. William Ide, III, 3/1/78; cf. Table III

[6] Discrepancy between Aetna's counsel's time records and amount requested.

[7] Memo BJ filed 11/14/78 at pp. 2-3.

[8] Actual total of ((2.8 hrs. x $45.00 per hr.) + 2.4 hrs. x $65.00 per hr.)), or ($1,251.00 + $156.00 = $1,407.00 as compared to $1,416.00.) Therefore, error of $9.00 in Memo BJ 11/14/78 at p.2.

[9] Acknowledged in Memo BJ 11/14/78 at p. 3 to be $1.00 higher than 6/7/78 Order.

[10] Total of "7", less award of $5,147.30. Therefore, further error of $182.15 in Memo BJ, 11/14/78.

OCT 9 1980

MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-344

QUINAULT PACIFIC CORPORATION;
INTERNATIONAL PAPER COMPANY;
WHITE LUMBER SALES, INC.; AND
GOLD REY FOREST PRODUCTS, INC.,
Petitioners,

versus

AETNA BUSINESS CREDIT, INC. AND
JOHN C. PENNINGTON, TRUSTEE,
Respondents.

BRIEF OF RESPONDENT AETNA BUSINESS CREDIT, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

R. WILLIAM IDE, III
Kutak Rock & Huie
1200 Standard Federal
Savings Building
Atlanta, Georgia 30303
(404) 522-8700
Counsel of Record for Respondent Aetna Business Credit, Inc.

C. EDWARD DOBBS
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(404) 522-8700
Counsel for Respondent Aetna Business Credit, Inc.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

No. 80-344

QUINAULT PACIFIC CORPORATION;
INTERNATIONAL PAPER COMPANY;
WHITE LUMBER SALES, INC.; AND
GOLD REY FOREST PRODUCTS, INC.,

Petitioners,

versus

AETNA BUSINESS CREDIT, INC. AND
JOHN C. PENNINGTON, TRUSTEE,

Respondents.

BRIEF OF RESPONDENT AETNA BUSINESS CREDIT, INC. IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The Judgment of the Court of Appeals for the Fifth Circuit was entered on May 8, 1980. *See* Petitioners' Joint Appendix at 1. That Judgment affirmed the opinion of the United States District for the Northern District of Georgia, Atlanta Division, which is unreported. The District Court's opinion had affirmed an order of the United States Bankruptcy Court, dated December 20, 1977.

QUESTION PRESENTED

Whether, based upon a review of the record in this case, the lower courts abused their discretion or were clearly erroneous in denying Petitioners' motion under Rule 60(b) of the Federal Rules of Civil Procedure.

STATEMENT OF THE CASE

This controvery arises from the bankruptcy proceeding of Georgia Paneling Supply, Inc. (the "Bankrupt"), which, though a no-asset case, has been pending in the Northern District of Georgia since July 29, 1974. (Vol. II, 332-341). Petitioners hold unsecured claims against the Bankrupt for goods sold on credit. (Vol. II, R-307-331). Respondent John C. Pennington is the bankruptcy trustee ("Trustee") for the Bankrupt and was elected to that position by Petitioners. (Supp. Vol. I, R-35). Respondent Aetna Business Credit, Inc. ("Aetna") is a commercial finance company, which, during 1973 and 1974, financed the accounts receivable and inventory of the Bankrupt.

In July of 1975, Petitioners persuaded the Trustee to sue Aetna and The C & S Bank ("C&S") to recover the value of the Bankrupt's property upon which Aetna and C&S had foreclosed their respective security interests. (Supp. Vol. I, R-8). The theory of recovery was that Aetna and C&S had received voidable transfers under the bankruptcy laws as the result of their foreclosures. After reviewing the findings of a private investigator whom he had retained to develop the evidentiary support for his complaint, the Trustee determined that his claim against Aetna was not meritorious. (Supp. Vol. II, R-4-7). Accordingly, the Trustee agreed to dismiss his claim against Aetna for his costs ($350) and requested

the Bankruptcy Court to permit him to settle on that basis, leaving him free to pursue what he felt was a meritorious claim against C&S. (Vol. IV, R-933-934).

Despite the vigorous objections of Petitioners, the Bankruptcy Court after a hearing approved the proposed settlement on June 16, 1976, and denied Petitioners' request to remove the Trustee from office for proposing the settlement. (Vol. II, R-373; *see* Petitioners' Joint Appendix at 66). On appeal the District Court affirmed the Bankruptcy Court's approval of the settlement. (Vol. III, R-552). However, by a separate order, the District Court permitted Petitioners to intervene into the Trustee's lawsuit to assert their own claims against Aetna and C&S, and those claims are still pending.

After the District Court's approval of the settlement, Petitioners filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure which requested that the settlement be nullified on the basis of alleged newly-discovered evidence. (Vol. III, R-558). The alleged newly-discovered evidence demonstrated, they argued, that Aetna never made a loan to the Bankrupt and therefore foreclosed upon the wrong company. Shortly before the hearing scheduled on their Rule 60(b) motion, Petitioners requested the Bankruptcy Court to continue the hearing for 35 days, to prohibit counsel for Aetna from participating in the hearing, to "incorporate by reference" as evidence in the hearing all discovery taken in the Trustee's lawsuit, and to set aside "two to three weeks" of its calendar to devote to the hearing. (Vol. II, R-268). The Bankruptcy Court denied these several requests of Petitioners (Vol. II, R-263-267), who on the morning of the hearing filed with the District Court a notice of appeal and request for immediate review (Vol.

II, R-260) and filed with the Bankruptcy Court a motion for a stay of the hearing and for a reassignment of the case to another bankruptcy judge who could set aside two weeks of his calendar for the hearing. (Vol. II, R-252-259). The Bankruptcy Court denied Petitioners' motion and the District Court denied Petitioners' appeal as "without merit" and "frivolous". (Vol. I, R-141). Following a two-day hearing on Petitioners' Rule 60(b) motion and the submission of documentary evidence (Supp. Vol. V, R-297-309), the Bankruptcy Court on December 20, 1977, denied their motion. The District Court affirmed that denial on appeal (Vol. I, R-26) and the Court of Appeals for the Fifth Circuit likewise affirmed.

REASONS FOR DENYING WRIT

I. THE COURTS BELOW FULLY CONSIDERED AND CORRECTLY DECIDED THE ISSUES

The Bankruptcy Court, the District Court and the Court of Appeals for the Fifth Circuit fully considered the issues raised in the instant Petition. The judgment of the Bankruptcy Court was entered after a two-day hearing (Supp. Vol. I, R-1), and was affirmed on appeal by the District Court. (Vol. I, R-26). The Court of Appeals for the Fifth Circuit, after a full briefing of the issues and oral argument, affirmed the judgments below on May 8, 1980, and denied Petitioners' petition for reconsideration on June 3, 1980.

The Courts below correctly decided the issues. The propriet[illegible]anting relief under a Rule 60(b) motion is addressed [illegible]he sound discretion of the court, *see Hand*

v. United States, 441 F.2d 529 (5th Cir. 1971), and is to be balanced against the competing interest of finality in litigation. *See In re Casco Chemical Company*, 335 F.2d 645 (5th Cir. 1964). Both the District Court and the Fifth Circuit concluded that the Bankruptcy Court had properly exercised its discretion in denying Petitioners' Rule 60(b) motion.

II. THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS

There is no conflict among the Courts of Appeals respecting any issue involved in the Petition. The Bankruptcy Court the District Court and the Fifth Circuit merely applied to Petitioners' allegations of newly-discovered evidence well-settled principles of law developed under Rule 60(b). In each instance, the lower courts concluded that Petitioners had failed to carry the burden of proof necessary to sustain their motion.

III. THE DECISION BELOW WAS CORRECT ON THE MERITS

The essence of Petitioners' Rule 60(b) motion was that they had newly-discovered evidence which warranted a vacation of the Bankruptcy Court's approval of the $350 settlement between the Trustee and Aetna. Their alleged newly-discovered evidence purportedly proved that Aetna never financed the accounts receivable and inventory of the Bankrupt.

The uncontroverted evidence presented at the Rule 60(b) hearing, however, demonstrated that the loan documents reflecting the financing arrangement were signed by the Bankrupt (Vol. IV, R-938-939) and that

during 1973 and 1974 Aetna advanced funds to the Bankrupt by wire transfer directly to the Bankrupt's checking account. (Supp. Vol. I, R-20-23; Vol. IV, R-961). Moreover, both the Bankrupt's president and vice-president testified that Aetna had financed the Bankrupt. (Supp. Vol. I, R-20-23). Petitioners' sole witness at the Rule 60(b) hearing even admitted that his understanding was and had always been that Aetna had financed the Bankrupt and that he had seen nothing to change his belief. (Supp. Vol. IV, R-131-133, 184-185). Therefore, the Bankruptcy Court's rejection of Petitioners' Rule 60(b) motion on this ground was and is amply supported by the record.

Petitioners also contended in their Rule 60(b) motion that they had newly-discovered evidence that Aetna had acted in "bad faith" towards the Bankrupt. The purported act of bad faith occurred in connection with a fire that destroyed the contents of a company affiliated with the Bankrupt. Petitioners asserted that all of the insurance proceeds payable on account of the fire were paid to the Bankrupt as insured and that the Bankrupt remitted these proceeds to Aetna. A portion of the insurance proceeds, Petitioners contended, were payable on account of certain equipment that was destroyed in the fire. According to Petitioners, the equipment was owned by a Ms. Ann Roberts (one of the shareholders of the affiliated company) rather than the Bankrupt, and that Aetna turned over the portion of the insurance proceeds attributable to the equipment loss to a bank which had a first lien on the equipment. Because Ms. Roberts allegedly did not receive any of the insurance money, Petitioners argued in their Rule 60(b) motion that she was unable to purchase new equipment and, therefore, unable to revive the operations of the affiliated company

as she purportedly had intended. As a result of this discontinuation of the affiliated company's operations, Petitioners concluded that the Bankrupt was deprived of "a substantial cash flow" generated by sales through the affiliated company and thereby allegedly was rendered "irretrievably insolvent".

Petitioners represented that they were unaware prior to the settlement hearing before the Bankruptcy Court either that the fire had occurred or that Aetna had received any of the insurance proceeds. (Supp. Vol. V, R-226-233). Thus they claimed that the facts concerning the fire constituted "newly-discovered evidence" within the meaning of Rule 60(b). However, Petitioners' counsel was forced to admit at the Rule 60(b) hearing that more than two years before the settlement hearing in 1976 he had attended a deposition of the Bankrupt's officers at which both the fire and Aetna's receipt of the insurance proceeds were testified to in detail by the Bankrupt's officers. (Supp. Vol. V, R-226-233). Even assuming that this evidence could somehow be regarded as newly-discovered, Petitioners failed to show how it would have altered the outcome of the settlement hearing. As the Bankruptcy Court correctly noted, Aetna's alleged failure to remit the fire insurance proceeds to Ms. Roberts did not violate any agreement with or right of the Bankrupt. Either Aetna was entitled to all of the insurance monies as proceeds of its collateral or Ms. Roberts (or the bank) was entitled to the portion attributable to equipment. The Bankrupt, however, had no claim to the money and Petitioners do not contend that it did. It should be noted that there is nothing in the record to support the majority of Petitioners' contentions. Their sole "proof" relating to the fire consisted of the affidavit of Ms. Roberts which nowhere states the amount of in-

surance proceeds attributable to the equipment; the amount of money allegedly remitted by Aetna to the bank; the amount of sales generated through the affiliated company prior to the fire; whether Ms. Roberts, in fact, intended to use the insurance proceeds allegedly payable to her to purchase the new equipment; and whether the Bankrupt was in fact rendered insolvent as a result of the loss of the affiliated company's operations.

IV. NO JUDICIAL MISCONDUCT OCCURRED BELOW

Petitioners dwell at length upon what they claim to be evidence of misconduct by the Bankruptcy Judge, the District Court Judge and counsel for Respondents, who purportedly conspired together to deprive Petitioners of a fair hearing and to defeat their Rule 60(b) motion.

The first act of misconduct alleged by Petitioners is that the Bankruptcy Judge, the District Court Judge and counsel for Respondents engaged in *ex parte* conferences concerning the Rule 60(b) motion. There is nothing in the record to support such an assertion, Petitioners have produced no evidence to that effect, and Respondents deny that such was the case. After he entered his order denying Petitioners' Rule 60(b) motion, the Bankruptcy Judge directed counsel for Respondents to prepare and submit to him proposed findings of fact and conclusions of law. Without further discussion of the matter, Respondents prepared the proposed findings (which assumed as true the factual assertions of Petitioners), submitted them to the Bankruptcy Judge's secretary, and later received them back from the Bankruptcy Judge in edited form. Such a procedure is not only a common practice in the bankruptcy courts of

this State, but also is expressly provided for by Rule 91.8 of the Local Rules of the Northern District of Georgia. Contrary to Petitioners' implication that these facts were concealed from the courts below, Petitioners' allegations have been fully addressed in the briefs and at oral argument before the Fifth Circuit.[1]

The second act of misconduct alleged is that the Bankruptcy Judge and the Trustee had "breakfast" together prior to the Rule 60(b) hearing. As the Trustee testified in a deposition taken by Petitioners, the Bankruptcy Judge, who was unaware that the Rule 60(b) motion was scheduled for hearing later that day, was having coffee at a diner across the street from the court house and, when the Trustee entered, invited him to sit at his table. The Trustee straightaway reminded the Bankruptcy Judge that he was involved in a matter before him that day and, after exchanging a few social remarks, the two parted company without ever having once discussed any aspect of the case. A representative of one of the Petitioners, who happened to be sitting at a table next to the Bankruptcy Judge and who overheard their conversation, reported this chance encounter to Petitioner's counsel, who did not ever mention the matter until several months later at the hearing to assess Petitioners with attorney's fees for their bad faith and frivolous litigation. Apart from the fact of this coincidental encounter, Petitioners have never once asserted that anything was ever said between the Bankruptcy

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[1] In their Petition at page 11, Petitioners purport to quote the Bankruptcy Judge as having said "[w]e even discussed it . . ." The quote has reference to the findings of fact and conclusions of law requested from Respondents by the Bankruptcy Judge. The full quote, however, is preceded by the words "I don't think that . . ."

Judge and the Trustee about the hearing, and the Trustee has under oath denied that any such discussions were had. The mere fact of this encounter is neither indicative of collusion nor a basis for judicial disqualification. *See, e.g., United States v. Mitchell,* 377 F. Supp. 1312 (D.D.C. 1974), *aff'd* 559 F.2d 31 (D.C. Cir. 1976), *cert. denied* 431 U.S. 933 (1977) (judicial disqualification was not required where judge's picture having dinner with special prosecutor had been published in newspaper which reported that judge and prosecutor had "bantered" about the case).

CONCLUSION

For the reasons stated above, it is respectfully submitted that Petitioners' Petition for Writ of Certiorari be denied.

Respectfully submitted,

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Aetna Business Credit, Inc.

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AFFIDAVIT OF SERVICE

STATE OF GEORGIA
COUNTY OF FULTON

R. William Ide, III, being first duly sworn, deposes and says that he served three copies of the foregoing Brief upon counsel for Petitioners and three copies of said Brief upon counsel for Respondents John C. Pennington and Freeman & Hawkins by depositing same in the United States Mail, with first class postage prepaid, addressed as follows:

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Two Peachtree Street, N. W.
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233 Peachtree Street,
Harris Tower
Atlanta, Georgia 30303

This 6 day of October, 1980.

R. William Ide III

R. WILLIAM IDE, III

Sworn to and subscribed
before me, this 6 day of
October, 1980.

Jessie L. Dumpsied

NOTARY PUBLIC
Notary Public, Georgia, State at Large
My Commission expires August 10, 1981

OCT 23 1980

MICHAEL RODAK, JR.

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980
NO. 80-344

QUINAULT PACIFIC CORPORATION,
INTERNATIONAL PAPER COMPANY,
WHITE LUMBER SALES, INC., and
GOLD REY FOREST PRODUCTS, INC.
Petitioners,

versus

AETNA BUSINESS CREDIT, INC.,
JOHN C. PENNINGTON, TRUSTEE,
Respondents

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF OF RESPONDENT JOHN C. PENNINGTON, TRUSTEE, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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and Freeman & Hawkins

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IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 80-345

QUINAULT PACIFIC CORPORATION; INTERNATIONAL PAPER COMPANY; W. KENT BISHOP; WHITE LUMBER SALES, INC.; AND GOLD REY FOREST PRODUCTS, INC.,

Petitioners,

versus

AETNA BUSINESS CREDIT, INC.; JOHN C. PENNINGTON, TRUSTEE; AND FREEMAN & HAWKINS,

Respondents

BRIEF OF RESPONDENTS JOHN C. PENNINGTON, TRUSTEE, and FREEMAN & HAWKINS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

OPINIONS BELOW

The Judgment of the Court of Appeals for the Fifth Circuit was entered on May 9, 1980. See Petitioners' Joint Appendix at 163. That Judgment affirmed the opinion of the United States District Court for the Northern District of Georgia, Atlanta Division, which is unreported. The District Court's opinion had affirmed an Order of the United States Bankruptcy Court, dated June 6, 1978.

QUESTIONS PRESENTED

Whether, based upon a review of the record in this case, the lower courts abused their discretion in awarding to Respondents John C. Pennington and Freeman & Hawkins legal fees incurred by reason of Petitioners' bad faith, vexatious and abusive conduct during the proceedings.

STATEMENT OF THE CASE

This controversy arises from the bankruptcy proceeding of Georgia Paneling Supply, Inc. (the "Bankrupt"), which, though a no-asset case, has been pending in the Northern District of Georgia since July 29, 1974. (Vol. I, R-123). The corporate Petitioners hold unsecured claims against the Bankrupt for goods sold on credit. (Vol. II, R-307-331). The individual Petitioner, W. Kent Bishop, is the attorney for the corporate Petitioners. Respondent John C. Pennington is the bankruptcy trustee ("Trustee") for the Bankrupt and was elected to that position by Petitioners. (Vol. I, R-123). Respondent Freeman & Hawkins is a law partnership that formerly served as the Trustee's counsel. Respondent Aetna Business Credit, Inc. ("AETNA") is a commercial finance company, which, during 1973 and 1974, financed the accounts receivable and inventory of the Bankrupt.

In July of 1975, Petitioners pursuaded the Trustee to sue Aetna and The C&S Bank ("C&S") to recover the value of the Bankrupt's property upon which Aetna and C&S had foreclosed their respective security interests. (Vol. I, R-124). The theory of recovery was that Aetna and C&S had received voidable transfers under the bankruptcy laws as the

result of their foreclosures. After reviewing the findings of a private investigator whom he had retained to develop the evidentiary support for his complaint, the Trustee determined that his claim against Aetna was not meritorious. (Vol. I, R-124-125). Accordingly, the Trustee agreed to dismiss his claim against Aetna for his costs ($350) and requested the Bankruptcy Court to permit him to settle on that basis, leaving him free to pursue what he felt was a meritorious claim against C&S. (Vol. I, R-124-125).

Despite the vigorous objections of Petitioners, the Bankruptcy Court after a hearing approved the proposed settlement on June 16, 1976, and denied the Petitioners' request to remove the Trustee from office for proposing the settlement. (Vol. I, R-125; see Petitioners' Joint Appendix at 66). On appeal the District Court affirmed the Bankruptcy Court's approval of the settlement. (Vol. III, R-125). However, by a separate order, the District Court permitted Petitioners to intervene into the Trustee's lawsuit to assert their own claims against Aetna and C&S.

After the District Court's approval of the settlement, Petitioners filed a motion under Rule 60(b) of the Federal Rules of Civil Procedure which requested that the settlement be nullified on the basis of alleged newly-discovered evidence. (Vol. I, R-126). Their alleged newly-discovered evidence demonstrated, they argued, that Aetna never made a loan to the Bankrupt and therefore foreclosed upon the wrong company. Shortly before the hearing scheduled on their Rule 60(b) motion, Petitioners requested the Bankruptcy Court to continue the hearing for 35 days, to prohibit counsel for Aetna from participation at the

hearing, to "incorporate by reference" as evidence in the hearing all discovery taken in the Trustee's lawsuit and to set aside "two to three weeks" of the Court's calendar to devote to the hearing. (Vol. I, R-139). The Bankruptcy Court denied these several requests of Petitioners (Vol. I, R-139), who on the morning of the hearing filed with the District Court a notice of appeal and request for immediate review (Vol. I, R-141) and filed with the Bankruptcy Court a motion for a stay of the hearing and for a reassignment of the case to another bankruptcy judge who could set aside two weeks of his calendar for the hearing. (Vol. I, R-141). The Bankruptcy Court denied Petitioners' motion and the District Court denied Petitioners' appeal as "without merit" and "frivolous." (Vol. I, R-141). Following a two-day hearing on Petitioner's Rule 60(b) motion and the submission of documentary evidence (Vol. I, R-141), the Bankruptcy Judge on December 20, 1977, denied their motion and the District Court affirmed that denial on appeal. (Vol. I, R-127).

Respondents thereafter applied to the Bankruptcy Court for an assessment of legal expenses incurred by them on the grounds that Petitioners' efforts to frustrate the $350 settlement were in bad faith, vexatious and frivolous. After a hearing that occurred over a six-day period (Vol. I, R-121), the Bankruptcy Court entered an order assessing Petitioners attorney's fees incurred by Respondents. (Vol. I, R-220). On August 30, 1978, the District Court affirmed the assessment (Vol. I, R-159) and thereafter reaffirmed its decision upon Petitioners' motion for reconsideration. The Bankruptcy Court entered detailed findings of Petitioners' misconduct,

which, among other things, consisted of their having willfully misrepresented as newly-discovered certain evidence that they had had for almost two years; having asserted legal positions as supported by authority when such positions were contrary to well-settled authority; having frivolously appealed from every interlocutory and final order entered in the case, including an appeal to the Court of Appeals of an order assessing $131.50 of transcript costs against them (Vol. I, R-126), which was peremptorily dismissed (Vol. I, R-127); having refused to adhere to verbal instructions from the Bankruptcy Court during hearings; and having taken contradictory factual positions in their Rule 60(b) motion (e.g., Aetna never loaned money to the Bankrupt) and in their subsequently filed intervenors' complaint in the Trustee's lawsuit (e.g., Aetna did advance money to the Bankrupt).

REASONS FOR DENYING THE PETITION

I. The Courts Below Fully Considered and Correctly Decided the Issues

An equity court has the unquestioned power to award attorney's fees against a party who has "'acted in bad faith, vexatiously, wantonly, or for oppressive reasons...' F.D. Rich Co., 417 U.S., at 129, 94 S.Ct. at 2165 (citing Vaughan v. Atkinson, 369 U.S. 527, 82 S.Ct. 997, 8 L.Ed. 2d 88 (1962)"; Alyeska Pipeline Co. v. Wilderness Society, 421 U.S. 240, 258-259, 95 S.Ct. 1612, 1622. See also In Re Swartz, 130 F.2d 229 (7th Cir. 1942) and Hutto v. Finney 98 S.Ct. 2565 (1978) p. 2573, n.14. The language of §2(a) of the Bankruptcy Act (11 U.S.C.A. §11) invests the courts of bankruptcy with jurisdiction in

equity. See Collier on Bankruptcy (14th ed.) ¶2.09 and the cases cited therein. In Swartz, supra the United States Supreme Court upheld the award of attorney's fees by a Bankruptcy Court. The Fifth Circuit has recently upheld the award of fees by a Bankruptcy Court where a party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons. See, Matter of Love, 577 F.2d. 344 (1978), and Creel v. Birmingham Trust Nat. Bank, 577 F.2d 352 (1978).

The award of attorney's fees may also be assessed against the parties' counsel, individually. Such award may be predicated upon either or both of two grounds. Bankruptcy Rule 911, which is an adaptation of Rule 11 of the Federal Rules of Civil Procedure states in relevant part:

> "The signature of an attorney on any pleading, motion or application served or filed in a bankruptcy case constitutes a certificate by him that he has read the paper; that to the best of his knowledge, information and belief, there is good ground to support it; and that it is not interposed for delay or other improper purpose. ... For a wilful violation of this rule an attorney may be subjected to appropriate disciplinary action. Similar action may be taken if scandalous or indecent matter is inserted."

§1927 of Title 28, U.S.C. reads as follows:

> "Any attorney or other person admitted to conduct cases in any court of the United States or any territory thereof who so multiplies the proceedings in

> a case as to increase costs unreasonably and vexatiously may be required by the Court to satisfy personally such excess costs."

The courts have invoked the provisions of 28 U.S.C. §1927 against counsel where it has been found that the action was frivolous or was brought for harassment, delay or some other improper purpose. See, E.G. Acevedo v. Immigration and Naturalization Service, 538 F.2d. 918 (2d Cir. 1976); Suel v. Addington, 465 F.2d. 889 (9th Cir. 1972); Browning Debenture Holders Committee v. DASA Corp., 560 F.2d. 1078 (2d Cir. 1977).

As noted by the Bankruptcy Court in this case in its Memorandum in support of the order assessing fees, an assessment of expenses should be reserved for "extraordinary" cases. The Bankruptcy Court appropriately found that this was such an "extraordinary" case and that an assessment of expenses was not a punishment of Petitioners for the exercise of their legal rights, but instead correctly shifts to them expenses of Respondents caused by their conduct and procedural tactics found to be taken in a frivolous, bad faith, vexatious and dilatory manner. (Petitioners Joint Appendix, p. 134).

The Courts below fully considered the issues raised in the instant Petition. The judgment of the Bankruptcy Court was entered after a hearing that consumed the better part of six days (Vol. I, R-121) and was affirmed on appeal by the District Court, which reaffirmed its decision upon Petitioners' request for reconsideration. (Vol. I, R-159, R-34). The Court of Appeals for the Fifth Circuit, after a full briefing of the

issues and oral argument, affirmed the judgments below on May 9, 1980, and denied Petitioners' petition for reconsideration on June 3, 1980.

II. There is No Conflict Among the Court of Appeals

That a federal court has the inherent power to assess attorney's fees against a party and his attorney for abusive and bad faith conduct in the course of litigation is the holding of this Court in Roadway Express, Inc. v. Piper, U.S. , 100 S.Ct. 2455, 65 L.Ed. 2d. 488 (1980). This ruling would effectively resolve any conflict among the Circuits, if indeed one ever existed. Furthermore, Petitioner, while alluding to a conflict among the Circuits, cites no authority and does not even make the argument that such a conflict exists.

III. No Issues of Public Importance Are Presented by This Case

The decision in this case is based upon and amply supported by facts and circumstances peculiar to it, all of which have been thoroughly sifted and reviewed by the lower courts. This Court should refrain from reviewing cases which turn on factual questions and which are devoid of any issues of public importance.

Petitioners brief is principally devoted to a tedious rehashing of facts largely at variance with the findings of the Bankruptcy Court. Petitioners' allegations of misconduct are untrue and without support in the record. The account of the facts set forth in the brief of the Respondent, Aetna Business Credit, Inc., is entirely accurate.

Moreover, even if Petitioners' allegations of fact were taken to be true, they are legally insufficient as a basis for recusal or disqualification of the Bankruptcy Court.

IV. Petitioners Seek to Raise an Issue Not Raised in the Court of Appeals

Petitioners contend that they are entitled to have the issue of their liability for the payment of the Respondent's attorney's fees tried before a jury, citing cases dealing with criminal contempt which are clearly not applicable here. Petitioners never sought a jury trial and are raising this issue in their Petition for Writ of Certiorari for the first time. Accordingly, this Court should not consider this issue.

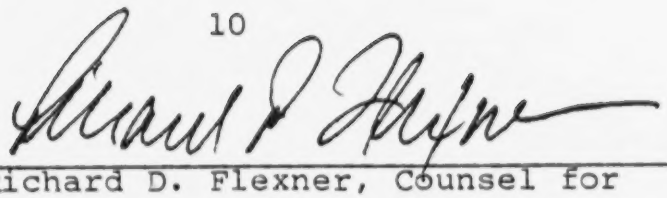
CONCLUSION

For the reasons stated above, it is requested that Petitioners Petition for a Writ of Certiorari be denied.

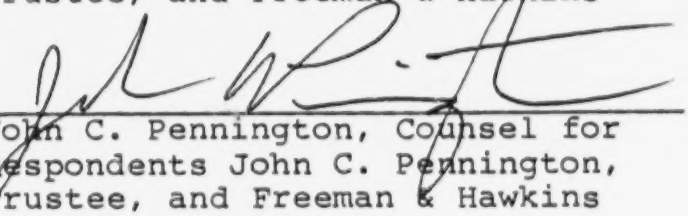
Respectfully submitted,

Howell Hollis, III, Counsel of Record for Respondents John C. Pennington, Trustee, and Freeman & Hawkins

Douglas L. Cronkright, Counsel for Respondents John C. Pennington, Trustee, and Freeman & Hawkins



Richard D. Flexner, Counsel for
Respondents John C. Pennington,
Trustee, and Freeman & Hawkins



John C. Pennington, Counsel for
Respondents John C. Pennington,
Trustee, and Freeman & Hawkins

AFFIDAVIT OF SERVICE

STATE OF GEORGIA

COUNTY OF FULTON

John C. Pennington, being first duly sworn, deposes and says that he served three copies of the foregoing Brief upon counsel for Petitioners and three copies of said Brief upon counsel for Respondent Aetna Business Credit, Inc. by depositing same in the United States Mail, with first class postage prepaid, addressed as follows:

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Atlanta, Georgia 30303

and that all parties required to be served with a copy of the foregoing Brief have been served.

This 6th day of October, 1980.

John C. Pennington

Sworn to and subscribed before me, this 6th day of October, 1980.

S. Dale Wilkes
Notary Public

Notary Public, Georgia, State at Large
My Commission Expires May 14, 1983

MICHAEL RODAK, JR

No. 80-344

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1980

QUINAULT PACIFIC CORPORATION,
INTERNATIONAL PAPER COMPANY,
WHITE LUMBER SALES, INC., and
GOLD REY FOREST PRODUCTS, INC., Petitioners,

versus

AETNA BUSINESS CREDIT, INC.
and JOHN C. PENNINGTON, TRUSTEE, Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

REPLY BRIEF OF PETITIONERS

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SUPPLEMENTAL QUESTIONS CONCERNING THE SUPERVISORY POWER

1. *Whether* false quotation of evidence, false statement of law, false assertion that issue not raised below, in respondents' briefs *justify* exercise of this Court's power of supervision in light of serious charges against respondents made in petitions for writ of certiorari.

2. Should a doubt be raised that the court-ordered deposition of a Freeman & Hawkins' partner (or the latter's incriminating time slips therein identified) is a part of the record on appeal in the 60(b) or fee case, *whether* a proper exercise of this Court's power of supervision *would be to analyze* the court-ordered deposition (and the attached time slips), which petitioners have had certified to this Court.

3. Should a doubt be raised that respondents' briefs make statements at variance with admissions in taped oral argument before a third panel of the court of appeals, *whether* a proper exercise of this Court's power of supervision would be to grant petitioners' June 30, 1980 application to *certify, transcribe and transmit* the oral argument tape to this Court, on which this Court apparently reserved decision.

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III. SIGNIFICANCE OF WHAT IS NOT SAID IN RESPONDENTS' BRIEFS

Respondents' briefs in opposition to writs of certiorari do not deny that respondents researched, drafted, edited and typed (a) the 12-page, June 17, 1976, bankruptcy order-opinion approving the $350 settlement; or (b) the 37-page, September 11, 1978, fee memorandum enumerating petitioners' alleged missteps; or (c) the 5-page, November 14, 1978, fee memorandum specifying the hours expended; nor (d) that the bankruptcy judge lied to petitioners in open court on March 6, 1978; nor (e) explicity deny admissions *in judico* at oral argument, April 14, 1980, before a third panel of the court of appeals.

There being no difference in appearance between a secret delegation of opinion-writing and collusion, every such act of the bankruptcy judge carries an appearance of partiality requiring mandatory disqualification under 28 U.S.C.A. §455. There being no defense to the judge's misrepresentations, he had a disabling bias as a matter of law. There being a clear conflict between Aetna's briefs and its admissions in open court, the tapes should be brought up and explanation demanded.

IV. FALSE STATEMENTS OF LAW

Statement (A)[1] — This is a false statement because it presumes the existence of facts which Aetna knows did not occur. For example, the bankruptcy judge did not announce decision on the 60(b) motion at the end of the September, 1977 hearing. He took the case under advisement.[2] Local Rule 91.8 requires court announcement of decision. Moreover, IN NO INSTANCE did respondents tender "sufficient copies for all parties" of the "orders including findings of fact and conclusions of law" "prepared in writing by the attorney for the prevailing party" as required by Local Rule 91.8. Respondents admitted this failure.[3]

Statement (B)[4] — This statement of law is false.

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[1] "Such a procedure [as respondents followed in jointly preparing the 40-page, 60(b) opinion with the bankruptcy judge] . . . is expressly provided for by Rule 91.8 of the Local Rules. . . ." (Aetna's Brief at 8-9.)

[2] The bankruptcy judge's last words on September 20, 1977 are as follows:

"The Court is going to set aside November 9 and 10 as possible dates for the continued trial in this matter if the evidence is needed.

"Court will be adjourned."

[Transcript, September 20, 1977, at 311: Supp. R. (79-1076) Vol. V. at 311.]

[3] In fact, as to the order entered September 16, 1977, the trustee's co-counsel, D. L. Cronkright, testified March 3, 1978 (at p. 85):

A. [By D. L. Cronkright] Did I send you a copy of what?

Q. [By Petitioners' counsel] Of that which you submitted to him [the bankruptcy judge] at his request, that was a proposed order in a case?

A. [By D. L. Cronkright] I did not.

Similarly, as to the order entered September 23, 1977, Cronkright testified March 3, 1978 (at 88-89):

Q. [By Petitioners' Counsel] Did you send me a copy of the one that you submitted to him [the bankruptcy judge]?

A. [By D. L. Cronkright] I did not.

[4] "Such award [of attorney's fees . . . against the parties' counsel, individually] may be predicated upon either or both of two grounds. Bankruptcy Rule 911 * * * [and] * * * §1927 of Title 28, U.S.C. * * * " (Trustee and Freeman & Hawkins' Brief 80-345, at 6).

The Supreme Court held June 23, 1980 that 28 U.S.C. §1927 did not confer power on a federal court to award attorneys' fees as costs against counsel. *Roadway Express, Inc. v. Piper*, — U.S. — , 100 S.Ct. 2455 (1980). Trustee and co-counsel actually cite *Roadway* at another place in their brief (page 8). *Roadway* had been cited in petitioners' June 30, 1980 application for stay etc. and September 2, 1980 fee petition (Case No. 80-345). Therefore, Trustee and co-counsel can only be guilty of an attempted deceit on this Court.

Statement (C)[5] — Neither Shepard's U.S. Citations, U.S. Reports, Lawyers Edition nor Supreme Court Reporter covering October Terms 1941 to 1947 indicate Supreme Court review of *In re Swartz*, 130 F.2d 229 (7th Cir. 1942).

V. FALSE QUOTATION OF EVIDENCE

Statement (D) — Aetna represents in footnote No. 1 on page 9 of its brief that the bankruptcy judge said: "I don't think we even discussed it."[6] The judge made no such statement. Aetna's quotation is malicious because the first three words of the manufactured quote, "I don't think [we even discussed it]", would be idiomatic when one's recollection was challenged and would mean, I did not discuss it. If there was a trace of doubt, it would be scarcely of import.

The words to be construed were: "- - we even discussed it," preceded by a broken sentence and an abandoned thought.

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[5] "In *Swartz, supra* the United States Court upheld the award of attorney's fees by a Bankruptcy Court." (Trustee's Brief, 80-345, at 6.)

[6] To petitioners' recollection, this is the first time respondents have denied that the judge made the admission. Until their Fifth Circuit brief, respondents' position seemed to be that the March 6, 1978 transcript was not a part of the 60(b) record, since the case was on appeal to the district judge when the hearing was held. The Fifth Circuit ruled April 7, 1979 that the March 6, 1978 transcript was a part of the 60(b) record. In ensuing appellate briefs, Aetna took the position that *its counsel* did not discuss the matter with the judge, *not that the judge did not admit it*, raising the issue of what is a discussion. However, at oral argument on April 14, 1980, Aetna's lawyer, R. William Ide III admitted in open court that Aetna's other lawyer, C. Edward Dobbs had discussed the order opinion with the judge. Petitioners urged the Court of Appeals to grant an *en banc* rehearing on account of Ide's admission. Petitioners urged *this* Court to call for the oral argument tape. Application No. A-1169, filed June 30, 1980, resubmitted July 15, 1980. From April 14, 1980 to October 8, 1980, respondents did not dispute petitioners' recollection of Ide's oral argument. Now that Aetna has uttered a false quotation and undercut the thrust of a statement to a panel of three Fifth Circuit judges, *the oral argument tape should be called for.*

The court of appeals held that *ex parte* conferences occurred.[7] The court had that portion of the record containing this admission before it when it made the finding.[8] Such a finding is appropriate where a judge's impartiality is questioned for the first time on appeal under the doctrine of *Davis v. Board of School Commissioners*, 517 F.2d 1044 at 1051 (5th Cir. 1975), *cert. denied* 425 U.S. 944 (1976). Moreover, the finding is correct.[9]

---

[7] "... the occurrence of *ex parte* conferences between the bankruptcy judge, the trustee, and Aetna's lawyer alone do not demonstrate collusion." 581 F.2d 520 at 521.

[8] From the June 26, 1978 district judge's 60(b) affirmance of the January 5, 1978, 40-page opinion and December 20, 1977 order written by Aetna's lawyer for the bankruptcy judge, petitioners simultaneously filed a FRAP 4 notice of appeal to the court of appeals (Case No. 78-2926), as to which a record on appeal was designated and transmitted, and a FRAP 6 petition for allowance of appeal (Case No. 78-8283). (Such a practice is suggested in 9 *J. Moore's Federal Practice*, Par. 206.02 pp. 1205-06.) *The March 6, 1978 transcript of the continued fee hearing was designated item No. 95 filed September 27, 1978 as "Appellants' Designation of Record with Respect to Notice of Appeal to court of appeals for Fifth Circuit filed July 26, 1978."* The district judge entered a September 29, 1978 order authorizing the clerk to forward copies of the record on appeal to the court of appeals, and the record was mailed to the court of appeals the same day. See docket sheet entries on pp. 26 and 27, located as index at front of R. (79-1076) Vol. I, which petitioners asked to be certified to this Court.

[9] Petitioners' counsel was conducting cross-examination of C. Edward Dobbs, Aetna's lawyer on March 6, 1978, having received Freeman & Hawkins' incriminating time records by clerical gaffe on February 28, 1978 and having deposed Pennington, Cronkright, Ide and Dobbs on March 3, 1978. Petitioners' counsel asked Dobbs whether conferences with Pennington and Cronkright on September 15, 1977 had anything to do with his "*ex parte* conference with Judge Norton to draft an order in th[e 60(b)] case." A partner of Dobbs at Kutak, Rock & Huie, serving as Dobbs' counsel, made an objection; the judge stated that an "accusation" had been made against him; and he overruled the objection *for the moment only* with this comment:

> "... That's the same sort of charge counsel made some days ago concerning someone else writing an opinion of this Judge, which I denied, or which is not factual, and if counsel wants to go into it he can. ... *I don't know what he meant by the ex parte conference or what*, but we will let counsel explore that, if he wishes." [Emphasis added.]

After Dobbs' counsel insisted that such questions were irrelevant because Aetna sought no fees pertaining thereto, the judge observed:

> "... *I just don't know what counsel means*, and I'll ask him right now: *what do you mean* by that statement *about some kind of ex parte conference* in which something was done. It sounds more ominous than the question might appear." [Emphasis added.]

Petitioners' counsel then read Canon 3A(4) of the Code of Judicial Conduct for United States Judges which restricts *ex parte* communications. The judge responded: "I don't know of any such. ..." but he allowed cross

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VI. FALSE STATEMENTS OF EVIDENCE

Paraphrase E[10] The Trustee swore: "I have had breakfast with

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examination of Dobbs to continue for a moment longer. When petitioners' counsel asked Dobbs whether he was aware of the judge's *ex parte* telephone calls and conferences to the trustee and Cronkright to draft the September 16, 1977 Order, the judge sustained objections. After further colloquy, the Court again confronted petitioners' counsel about petitioners' allegations concerning *ex parte* conferences pertaining to the 40-page, Rule 60(b) opinion of January 5, 1978. Petitioners again explained. The judge still seemed to be confused as to whether petitioners' objection was to a mere discussion, an *ex parte* discussion, or Dobbs drafting the 40-page opinion. So it was that in thinking out loud about the draft opinion which Dobbs had drafted for him earlier and whether he had asked Dobbs for more research and writing to cover a specific point, he adverted to the conversation and blurted out a declaration of past fact: We even discussed it. The statement was not uttered in connection with a preceding broken-off sentence when the apparently trivial discussion darted across his mind. The judge was saying that the discussion was not an *ex parte* conference and its occurrence did not mean that Dobbs had drafted the judge's order. Later he reversed himself and said "I do not recall any such [*ex parte* conference]." When he was asked whether Dobbs had made any input into the 40-page opinion, the judge cut off further colloquy and cross-examination.

Proof that the judge made a declaration of a past fact is demonstrated by a linguistic examination of the two uses to which the adverb "even" is put in the following sentences:

> "Now, you keep using the words wrote and draft. Now, that is incorrect. Mr. Dobbs' office typed an opinion for this Court. I don't *even* remember whether, at the time, I gave him back the briefs, that Mr. - - we *even* discussed it. [emphasis added.]"

The first "even" is spoken after a concern is expressed about the parameters of the words "wrote and draft." The judge is being more precise than petitioners' counsel; the judge is stating that his memory is not exact. By contrast, the syntax in which the second "even" appears would prohibit a meaning of "exactly." Thus, the second "even" is used as an intensive to emphasize something unexpected and unimportant and to stress the comparative degree of his later recollection to his earlier memory. See *Webster's New Collegiate Dictionary* (1973) at 396.

The court reporter in the bankruptcy judge's courtroom is hired by the bankruptcy judge (Bankruptcy Act of 1898, Sec. 38(7); Bankruptcy Rule of Procedure 511) who has the power not only to fire the court reporter or to quit using him, but also to assess costs against a party to pay the court reporter a competitive rate for services, as for a private deposition.

After the above colloquy was concluded, petitioners asked the court reporter to transcribe the hearing as quickly as possible. The transcript was available March 11, 1978. The transcript was faithful to the words used on page 25, but erred in not capitalizing "we" in line 22. Petitioners agonized over whether to raise this point of capitalization but feared that with attention drawn to their contentions, the bankruptcy judge would deny the declaration or might invalidate the entire transcript.

[10] The bankruptcy judge and the trustee did not have breakfast together, September 20, 1977, immediately prior to the remanded rule 60(b) hearing. (Aetna's brief at 9.)

him before and it could have been that day. . . ." Depo. John C. Pennington, March 3, 1978 at 27. In oral argument on April 14, 1980 the trustee's attorney, Douglas L. Cronkright, stated that the trustee and judge had breakfasted together September 20, 1977. The "Reply of John C. Pennington, Trustee, to Petition for Allowance of Appeal" filed in the Fifth Circuit August 7, 1980 (hereinafter, "The Reply") allows an inference on page 17 which is opposite in meaning to Aetna's hearsay statement about the sequence of events at the breakfast table, to wit: Rather than the coffee-drinking judge inviting the belated trustee to the table, it was the trustee who was having breakfast and invited the judge to sit and have coffee with him.[11] Petitioners have asked the Fifth Circuit clerk to forward "The Reply" to this Court.

Statement (F)[12] — The recited sequence in which the December 20, 1977 order and January 5, 1978, 40-page opinion were prepared is false as revealed by Freeman & Hawkins' time slips No. "267" and "268" found in "Appellants' Exhibit No. A-2," to the deposition of Cronkright, taken March 3, 1978, and identified by him as time slips delivered to petitioners' counsel February 28, 1978 by Cronkright's paralegal (Pp. 93, 22, 61, 62, 38). The time slips are set out at Petitioners' Joint Appendix at p. 251; they read as follows:

"12/20/77 Delivery of Norton's Order and pick-up of draft of opinion .3"

"12/20/77 Telephone conference with Dobbs regarding Judge Norton's Order opinion written. . . . .2"

The 60(b) Order is dated and was filed December 20, 1977. It would be impossible to research and draft a 40-page judicial opinion, have it typed, submit it to a judge, confer with the judge thereon, and then retype it, all on December 20. Therefore, the opinion referenced on the December 20 time slips was prepared prior to that date, and prior to the order of the same date. This is amply confirmed in the time slips for November 1, 2, 1977. *See* App. at 249.

Statement (G)[13] — This statement of Aetna is false, abso-

[11] "For the same reasons, the drinking of coffee by the Judge at the Trustee's restaurant breakfast table does not form the basis for a disqualification, especially where the Trustee has sworn that the merits of the case were not discussed."

[12] "After he entered his order denying Petitioners' Rule 60(b) motion, the Bankruptcy Judge directed counsel for Respondents to prepare and submit to him proposed findings of fact and conclusions of law." (Aetna's assertion of the sequence of events, Brief at 8.)

[13] "There is nothing in the record to support [petitioners' assertion of *ex parte* conferences concerning the Rule 60(b) motion] . . . ." (Aetna's Brief at 8.)

lutely. Cronkright signed his name on August 4, 1978 for Freeman & Hawkins, as attorneys for the trustee, to "The Reply" which states at p. 16, as follows:

> "As shown by the sworn testimony of the Trustee and his counsel, the meetings in connection with the first Order were the only *ex parte* conferences between the Court, Trustee and his counsel."

From Cronkright's March 3, 1978 deposition, at pages 82, 83 appears the following:

> Q. [By Petitioners' Counsel] Had you had any other *ex parte* conferences with the referee, Norton, prior to this one?
>
> A. [By Cronkright] If you're speaking of Judge Norton, I've had no *ex parte* conference with him other than in connection with the taking of this order.

Pennington then gave the opinion that if he had discussed the 60(b) hearing with the bankruptcy judge before the hearing at breakfast, which he denied, it would have been "unethical." Depo. Pennington, March 3, 1978, at 28 and 27. The trustee's "Exhibit 'A' " to affidavit attached to "Application of the Trustee and Co-Attorney for the Trustee for Compensation," filed February 27, 1978 shows *ex parte* conferences with the bankruptcy judge on September 15, 1977, September 16, 1977, November 1, 1977, November 2, 1977 and December 20, 1977. See App. at 245, 246, 249, 251.

Even the district judge owned up to an *ex parte* conference with the trustee in the order entered September 30, 1976 in the plenary action. *See* App. at 153.

Although Ide told the third Fifth Circuit panel that Aetna would not hide behind the alleged non-presence in the 60(b) or fee records of disqualifying evidence of misconduct, Aetna has taken the opposite tack in its brief. But as previously shown the position is not well taken. The evidence is in the record.[14]

[14] As to the 60(b) case, the matter was on appeal to the district court when *trustee's second fee application* was filed February 27, 1978 depicting in exhibited time records to his affidavit that he had had conferences with the bankruptcy judge concerning the 60(b) motion from September to December 1977. Not only are these time records in the fee record (Vol. I), they are also in the 60(b) record (Vol. I of the fee record is also marked Vol. I of the 60(b) record) because petitioners so designated them in September 1978 in another appeal which was stricken, but the instant appeal was ultimately granted and the district court resubmitted the first record on

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Statement (H)[15] — This statement in Aetna's reply to the fee petition apparently is a reference to allegations in the first full paragraph on page 7 of Aetna's reply to the 60(b) petition. The first sentence of that paragraph[16] contains two false statements

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appeal as the second record on appeal. Aetna failed to object as to the record for the first appeal and its objection to the record for the second appeal was ineffective because the district judge's February 20, 1979 order is unclear as to its application to the 60(b) or fee case. Moreover, this Court can take judicial notice in the 60(b) case of their inclusion in the fee case.

Freeman & Hawkins' incriminating time slips, delivered to petitioners' counsel by clerical gaffe on February 28, 1978 are located on three pages designated appellants' exhibits A-1, A-2, A-3 to the deposition of D. L. Cronkright, March 3, 1978, in which they are identified thrice by the deponent. They also appear as an attachment to affidavit of petitioners' counsel dated March 6, 1978 and filed in connection with (a) an application to district court on March 6, 1978 to take depositions of respondents' counsel pending appeal of the 60(b) case to the district court and (b) a second application filed in bankruptcy court on March 6, 1978, to remove the trustee and his co-counsel, Freeman & Hawkins. Furthermore, the incriminating time slips are attached to an amended reply and supplemental brief filed in district court on March 17, 1978 which related to a reply and supplemental brief filed March 15, 1978 raising in the 60(b) case the improprieties depicted in the time slips and records.

Aetna's fee memorandum for the bankruptcy judge filed September 11, 1978 refers to petitioners' second application filed in bankruptcy on March 6, 1978 to remove the trustee and effectively denies the application. Petitioners' counsel's affidavit attaching incriminating time slips of Freeman & Hawkins, submitted in connection with the motion, were thus considered to be part of the fee record by the judge, and Aetna should not be heard to complain now.

Cronkright's March 3, 1978 deposition forms part of the 60(b) record on appeal because it was designated a part of the record in a first appeal from the district court to the Fifth Circuit, to which Aetna took no exception, and was resubmitted by the district court as the record on appeal to a second appeal which was heard by the Court of Appeals. Aetna's objection was untimely. His deposition is a part of the fee record because Cronkright did not disaffirm it upon reference thereto by petitioners' counsel at the continued fee hearing March 6, 1978. In similar fashion the depositions of Pennington, Ide and Dobbs are part of the records on appeal in the 60(b) and fee cases.

Should this Court have any doubt whether Freeman & Hawkins' incriminating time slips or Cronkright's, *Pennington's, Ide's or Dobb's depositions* are part of the record, three additional issues are raised:

1. Whether the Fifth Circuit oral argument tapes should be certified, transcribed and submitted to this Court.

2. If the tapes disclosed Ide's concession that Aetna would not avoid the issues of impropriety by any technical deficiency in the record, whether this Court' supervisory power should be invoked to work an estoppel against Aetna to back away from its concession.

3. Without reference to the tape, whether this Court's supervisory power could or should be invoked to consider evidence outside the record which is probative because an admission or declaration against interest by

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of evidence. In fact, Petitioners' counsel stated: "I believe that I knew that there had been a fire, but I had no idea[precisely] when the fire had taken place. . . ." (Supp. R. (79-1076) Vol. V at 227.) The bankrupt's verified Statement of Affairs, filed August 7, 1974, represented that the fire occurred January 19, 1974 (which was *after* the Aetna-Forest Park loan documents were signed on or about January 7, 1974) and not December 31, 1973 (which was *before* the date of those documents). The correct dates demonstrate, along with other evidence cited in the cert. petition, Aetna's fraud upon and harm to the bankrupt. Contrary to Aetna's assertion that "the bankrupt's officers [testified about] the fire in detail . . . ." the deposition shows the following:

> "Q [By John E. Sawhill then-attorney for International Paper Company] Tell me about the fire that Georgia Paneling Company of Forest Park had. I understand there was a loss in January of 1974 of - -
> A [By T. R. Locke] Um-humm
> Q - - $76,000 in inventory and equipment and the claim was settled in full.
> A Yes.
> (Deposition T. R. Locke, September 20, 1974 at 40.)[17]

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lawyers or obtained by proper legal process with right to counsel.

For argument that the tapes should be brought up, see petitioners' "Applications" filed June 30, 1980 and renewed July 15, 1980. (No. A.1169) The Supreme Court has not ruled on this particular application. The scope of the supervisory power is unlimited once invoked. That federal judges and attorneys admitted to the Bar of this Court are involved should remove any inhibition against its exercise.

[15] "Petitioners[ ] . . . willfully misrepresented as newly-discovered certain evidence that they had had for almost two years. . . ." (Aetna's brief, No. 80-345, at 4).

[16] "Petitioners represented that they were unaware prior to the settlement hearing before the Bankruptcy Court either that the [1] fire had occurred or that [2] Aetna had received any of the insurance proceeds." (Aetna's brief, No. 80-344, at 7.)

[17] The second false statement is Aetna's assertion that Petitioners *represented* they lacked knowledge that Aetna had received any of the insurance proceeds and that petitioners claimed this was newly-discovered evidence. In fact, petitioners' counsel swore that "[o]n August 13, 1974, I examined the bankruptcy file . . . . I also learned that the fire loss was covered by insurance and the payment was retained by Aetna to apply to the indebtedness owed by Sup; ly to Aetna." This affidavit was submitted to the bankruptcy judge on October 11, 1977, after he had adjourned the remanded 60(b) hearing for submission of briefs of evidence, but before he had announced decision on the motion; and the affidavit corrected petitio-

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VII. MISLEADING STATEMENTS OF FACT

Paraphrase (I)[18] — Respondents' briefs condemn petitioners' attempt to prohibit Aetna from actively participating in the remanded 60(b) hearing, but do not state why. The statement of the case should provide part of the answer. Too, Aetna had presumed itself to be a mere "amicus curiae" in respect of petitioners' appeal from the June 17, 1976, Aetna-prepared bankruptcy order approving the $350 settlement. "Brief of Amicus Curiae Aetna Business Credit, Inc.", filed November 15, 1976, has been certified to this court at petitioners' request. Contradictorily, Aetna then filed an application on September 1, 1977 for an award of attorneys' fees for that appeal. *Universal Oil Products Co. v. Root Refining Co.*, 328 U.S. 575 (1946), expressly prohibits attorneys' fees or costs to amicus curiae. Petitioners wanted to keep Aetna an amicus and place on Aetna the burden of showing the trustee was incompetent to resist petitioners' 60(b) motion.

Paraphrase (J)[19] — There is a fatal contradiction in Aetna's brief of respondent (and Aetna's opinions for the bankruptcy judge). On the one hand, Aetna acknowledges that "the factual assertions of Petitioners" are "assumed as true" (Brief at 8), and on the other hand, "there is nothing in the record to support the majority of Petitioners' contentions. Their sole 'proof' relating to the fire consisted of the affidavit of Ms. Roberts which nowhere [gives certain information]." (Brief at 7 and 8.) However, Aetna's former vice president, Thomas C. Duke, testified that "something like $500" was remitted by Aetna to the bank;[20] Aetna's internal audits for October 31, 1973 demonstrate that $21,524 of (year to date) sales were generated through Forest Park[21]; on October 31, 1973 Forest

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ners' recollection at the 60(b) hearing (". . . I did not know, as I recall, that Aetna had insured it or that there were insurance proceeds."). At no time did petitioners claim that their learning that Aetna had received insurance proceeds was newly-discovered evidence, but only that Aetna's failure to remit that portion representing Roberts' equipment (not Paneling's equipment) *harmed the bankrupt*. See 60(b) motion at pages 3-4, 23, 25, 31, 22. The taking of the above-referenced Locke deposition was disclosed at the May 18, 1976 settlement hearing. (Supp. R. (79-1076) Vol. II at 54.)

[18] Seeking to bar Aetna's active participation was unreasonable (although Aetna was a self-described *"Amicus curiae."*) (Aetna's brief at 3.)

[19] There is insufficient newly discovered evidence (notwithstanding contradiction in Aetna's argument). (Aetna's brief at 7-8.)

[20] Deposition, T. C. Duke, June 15, 1977, Vol. II at 159. (not in record on appeal)

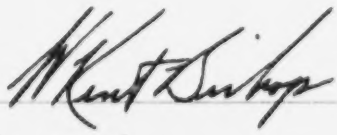
[21] Pl. Exhibit 366.(not in record on appeal)

Park had $22,497 of inventory at cost[22]. Contrary to Aetna's assertion T. R. Locke's affidavit constitutes proof that $26,000 was the amount of insurance proceeds attributable to the equipment[23] which Roberts itemized in an affidavit. As to whether the Bankrupt was rendered insolvent as a result of loss of Forest Park's operations, Roberts' affidavit lends itself to that reasonable inference.[24] Also petitioners' statement of evidence which was assumed to be probative was that loss of the Forest Park outlet rendered the Bankrupt insolvent.[25] Roberts was outside the court room and prepared to fill in the details when the hearing was adjourned.

Paraphrase (K)[26] — Consider that the trustee telephoned the bankruptcy judge's secretary September 14, 1977, conferred twice *ex parte* with the judge September 15, consuming 5.5 hours; conferred with judge 7.8 hours on September 16 and then telephoned the judge later that day that the order had to be changed; consumed 4.9 hours in drafting an order for the judge on September 19, and then had breakfast before an 8:00 a.m. hearing on the 60(b) motion, September 20.

Thus there was opportunity, over the preceding four business days, for them to make a breakfast appointment; there was reason to do so, i.e., to further discuss draft orders for the judge and to plan the hearing and its successful outcome (for the trustee and Aetna).

Respectfully submitted,
WINFORD KENT BISHOP



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[22] Pl. Exhibit 370. (not in record on appeal)

[23] Affidavit, T. R. Locke, July 19, 1977, paragraph 4. (R79-1076.)

[24] Paragraphs 24, 25, 26 and 27.

[25] "Capital is what generates income. The Georgia Paneling Company of Forest Park, Inc., was capital to be looked at as capital. It produced cash flow that was essential to Georgia Paneling Supply because in December it became insolvent, and Aetna started jockeying around with the advances and restrictions. All right. That capital, that $60,000 was very important to Georgia Paneling and should have been used in the business to buy new inventory or to buy a new store or a new outlet or a new lease or something like that." (Supp. R. (79-1076) Vol. V at 238.)

"So that's what Georgia Paneling did. Aetna had put them in a situation of extremis. . . ." (*Id* at 240.)

[26] At breakfast encounter, September 20, 1977, bankruptcy judge was "unaware" of 8:00 A.M. hearing; and enounter was by "chance" and "coincidental."

VIII. CERTIFICATE OF SERVICE

I hereby certify that I have served three copies of the foregoing Reply Brief of Petitioners upon each respondent by depositing same in the United States Mail, sufficient postage prepaid, properly addressed to counsel at their last known addresses.

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This 27 day of October, 1980.

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